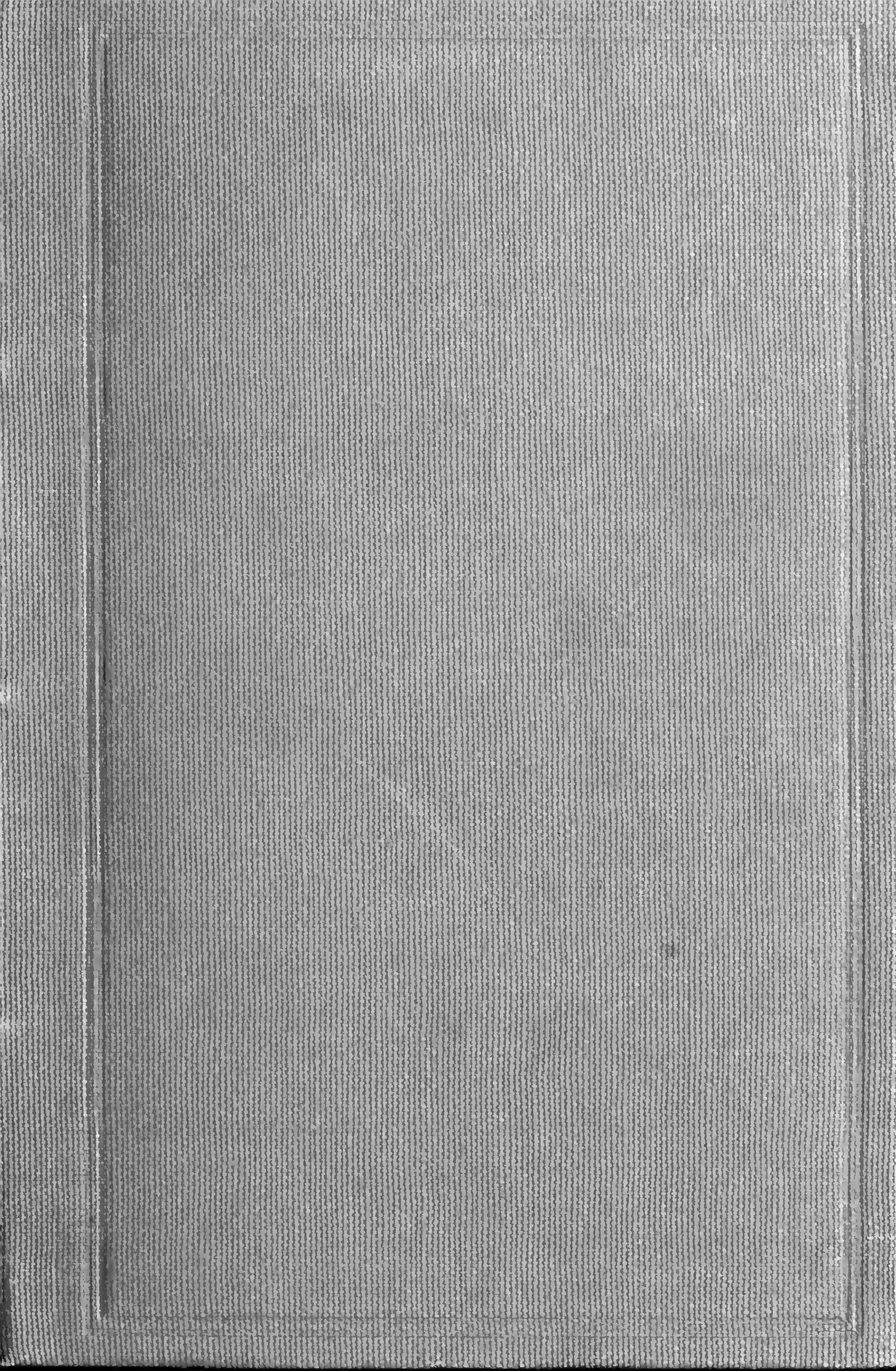

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NO. 7753

Vol. 1894

United States
Circuit Court of Appeals
For the Ninth Circuit

WALTER CHALAIRE,

Appellant,

vs.

CORNELL S. FRANKLIN,

Appellee.

Transcript of Record

Upon Appeal from the United States Court for China

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PAUL P. O'BRIEN,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES:

MR. PAUL F. FAISON,
Shanghai, China,
for Plaintiff.

MR. CORNELL S. FRANKLIN,
Shanghai, China,
for Defendant.

In the United States Court for China

Cause No. 3628

Civil No. 1659

WALTER CHALAIRE,

Plaintiff,

vs.

CORNELL S. FRANKLIN,

Defendant.

[Endorsed]: Filed at Shanghai, China, February 1st, 1934.

COMPLAINT

For cause of action against the Defendant, Plaintiff respectfully shows the Court as follows:

1. Plaintiff is an American citizen and resides in the city of New York, United States of America, and Defendant is an American citizen and resides in the city of Shanghai, China.

2. At all times hereinafter mentioned Plaintiff and Defendant were attorneys-at-law duly admitted and qualified to practice law in Shanghai, China, and from May 1, 1924, to January 1, 1928 were engaged in the practice of law in Shanghai as partners, under an agreement entitling Plaintiff to 60% and Defendant to 40% of the profits of the partnership business.

3. On February 10th, 1927, Plaintiff being about to take a vacation in the United States entered into an agreement with Defendant at Shanghai, China, whereby it was agreed between them that Plaintiff would take a vacation to begin on or about the date of making said agreement, and ending on January 1st, 1928, it being therein provided between them that during the period of Plaintiff's vacation Plaintiff would continue to receive his 60% share of the profits of the partnership, and continue to be liable as such partner for any partnership obligations during said period of Plaintiff's vacation, and that if Plaintiff returned to China at the termination of the aforesaid vacation period, then Plaintiff and [1*] Defendant would continue their partnership business on the same basis as the aforesaid partnership theretofore existed, and which aforesaid agreement also provided in the alternative that if Plaintiff should elect to retire from the partnership and not return to China to resume the practice of law that Defendant, in consideration of Plaintiff refraining from continuing in the practice of law in China, and conveying, abandoning and relinquishing to Defendant the Plaintiff's rights and interests in the partnership business and the goodwill thereof and the other partnership property including law books, furniture, fixtures, and office paraphernalia, would pay to Plaintiff the sum of Shanghai Tls. 50,000.00, said payment to be made out of six-tenths of the profits to accrue to Defendant in the practice

*Page numbering appearing at the foot of page of original certified Transcript of Record.

of law on and after January 1st, 1928, the aforesaid agreement being in words and figures as follows:

"Shanghai, February 10, 1927.

C. S. Franklin, Esq.,
Shanghai.

Dear Cornell:

This will serve to confirm the arrangement which we made in connection with my impending departure.

I will take a vacation, ending on January 1, 1928, during which time I will continue to receive my share of the profits of the partnership and I presume I shall be liable as a partner for any partnership obligations during that period.

As you know, I may or I may not return to China; the matter is indefinite. If I return the matter is simple, we go on as we have before; if I do not, you are to pay me Tls. 50,000., to accrue as profits are made on and after January 1, 1928; 6/10ths of the profits to be paid to me until the sum of Tls. 50,000. has been paid, at which time the entire business shall be yours. I presume that [2] although my interest in the profits shall continue until the sum above mentioned is paid after January 1, 1928, my liability shall cease at that time.

If the foregoing is in accordance with your understanding, please sign the same.

Faithfully yours

WALTER CHALAIRE
C. S. FRANKLIN."

4. Pursuant to the terms of the aforesaid agreement, Plaintiff during the month of November 1927,

elected to retire from the aforesaid partnership and refrain from practicing law in China commencing as of January 1, 1928, and during said month of November 1927 so notified Defendant of his election, and effective on and as of January 1, 1928, conveyed, abandoned and relinquished to Defendant Plaintiff's rights and interests in the partnership business, and the goodwill thereof, and the other partnership property including law books, furniture, fixtures, and office paraphernalia, and commencing on January 1, 1928, Plaintiff has always refrained from practicing law in China, and has performed all things on his part to be performed pursuant to and by virtue of the aforesaid agreement, and by reason of all of the foregoing Defendant became obligated, pursuant to the terms of the aforesaid agreement, to pay to the Plaintiff out of six-tenths of the profits to accrue to Defendant in the practice of law on and after January 1, 1928, the sum of Shanghai Tls. 50,000.00.

5. Defendant has continued to practice law in China from the 1st day of January, 1928, to the present day, and has pursuant to the terms of the aforesaid agreement acquired, received and possessed all of the profits, rights and interests in the aforesaid partnership business and the goodwill thereof, and the partnership property, including law books, furniture, fixtures, and office paraphernalia, and the benefits accruing by reason of Plaintiff refraining from practicing law in China. [3]

6. From January 1, 1928, to March 31, 1928, inclusive, Defendant made as profits in the practice

of law at Shanghai, China, the sum of Shanghai Tls. 3,709.80, and pursuant to the terms of the aforesaid agreement and in part performance thereof paid to Plaintiff six-tenths of the aforesaid sum of Shanghai Tls.3,709.80, which six-tenths was equal to Shanghai Tls.2,225.88, and from April 1, 1928, to April 30, 1930, inclusive, Defendant made as profits in the practice of law at Shanghai, China, a sum of money six-tenths of which is more than the sum of Shanghai Tls.47,774.12, and Defendant therefore and by reason thereof thereupon became obligated to Plaintiff in the sum of Shanghai Tls.47,774.12, being the unpaid portion of the sum of Shanghai Tls.50,000.00 which Defendant was obligated to pay to Plaintiff pursuant to the terms of the aforesaid agreement.

7. After April 30, 1930, Plaintiff has often demanded payment from Defendant of said Shanghai Tls.47,774.12, but Defendant has always refused to pay the same or any part thereof.

WHEREFORE, Plaintiff prays judgment against Defendant for Tls.47,774.12 with legal interest thereon from April 30, 1930, and for the costs of this action.

(Signed) PAUL F. FAISON
Attorney for Plaintiff

United States of America
Extraterritorial Jurisdiction in China
Consular District of Shanghai—ss:

PAUL F. FAISON being first duly sworn deposes and says that he is the attorney for the Plaintiff in the above entitled action, that he has read

and signed the foregoing complaint and knows the contents thereof, and that the facts therein stated are true; that the reason this verification is made by him and not by the Plaintiff is that Plaintiff is absent [4] from China and from the jurisdiction of this court and there is no person other than affiant who is capable of verifying the complaint.

(Signed) PAUL F. FAISON

Subscribed and sworn to before me this 1st day of February, 1934, at Shanghai, China.

(Signed) WILLIAM T. COLLINS, Clerk
United States Court for China. [5]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, February 21, 1934.

ANSWER

Now comes the defendant above named and for answer unto the plaintiff's complaint admits, denies and alleges as follows:

1: The defendant admits the allegations contained in paragraphs 1 and 2 of the plaintiff's complaint.

2: For answer unto paragraph 3 of the plaintiff's complaint the defendant admits the agreement between the parties hereto as quoted in said paragraph 3 but denies that the consideration for the agreement of the defendant therein was plaintiff refraining from continuing in the practice of law in China and conveying, abandoning and relinquish-

ing to defendant the plaintiff's rights and interests in the partnership business and the goodwill thereof and the other partnership property including law books, furniture, fixtures and office paraphernalia.

3: Defendant denies the allegations contained in paragraph 4 of the plaintiff's complaint.

4: For answer unto paragraph 5 of the plaintiff's complaint the defendant admits that he has practiced law in China from January 1, 1928 to date but denies the other allegations in said paragraph contained. [6]

5: For answer unto paragraph 6 of the plaintiff's complaint the defendant admits having made as profit in the practice of law at Shanghai, China, the sum of Shanghai T3,709.50 from January 1, 1928 to March 31, 1928 inclusive and admits having paid to plaintiff 6/10 thereof pursuant to the terms of the aforesaid agreement and in part performance thereof, and further admits having made as profit in the practice of law at Shanghai, China, a sum of money 6/10 of which is more than the sum of Shanghai T47,774.12 from April 1, 1928, to April 30, 1930, but denies the other allegations in said paragraph contained.

6: For answer unto paragraph 7 of the plaintiff's complaint the defendant admits the allegations therein contained and further alleges that on March 31, 1928 he informed the plaintiff in writing that he, the defendant, would not make further payments to plaintiff under the aforesaid agreement.

7: For further answer unto plaintiff's complaint the defendant alleges that he agreed to pay to plain-

tiff 60 per cent of the net profits of the law practice or business carried on in China after January 1, 1928 by the defendant under the firm name and style of Chalaire & Franklin until a total sum of Shanghai T50,000.00 had been paid; that he duly paid to plaintiff such percentage of the net profit of Chalaire & Franklin until March 31, 1928, when the defendant ceased the practice of law under the firm name and style of Chalaire & Franklin and abandoned the goodwill attaching to the name of Chalaire & Franklin; and that thereafter he duly paid to plaintiff the plaintiff's share of the value of the law books, furniture, fixtures and office paraphernalia of the former partnership of Chalaire & Franklin. [7]

FIRST SEPARATE AND DISTINCT DEFENSE

For a further, separate and distinct defense to plaintiff's complaint the defendant alleges:

1: The defendant repeats the admissions, denials and allegations contained in paragraphs 1 to 7 inclusive above.

2: The defendant further alleges that there was no consideration for his execution of the aforesaid agreement or for his undertakings therein contained.

SECOND SEPARATE AND DISTINCT DEFENSE

For a further, separate and distinct defense to plaintiff's complaint the defendant alleges:

1: The defendant repeats the admissions, de-

nials and allegations contained in paragraphs 1 to 7 inclusive above.

2: The defendant further alleges that if there was legal consideration for his execution of the aforesaid agreement and for his undertakings therein contained, an important part of such consideration was plaintiff's promise to secure in the United States, lucrative legal business and send the same to the defendant in China.

3: The plaintiff failed to make good his promise to send lucrative legal business to the defendant from the United States and by reason of such thereof there was a failure of consideration for defendant's undertakings in said agreement contained.

THIRD SEPARATE AND DISTINCT DEFENSE

For a further, separate and distinct defense to plaintiff's complaint the defendant alleges:

1: The defendant repeats the admissions, denials and allegations contained in paragraphs 1 to 7 inclusive above. [8]

2: The defendant further alleges that the Statute of Limitations has run against the claim hereby sued upon.

* * * * * * * *

WHEREFORE defendant prays that plaintiff's complaint be dismissed at plaintiff's cost.

Dated at Shanghai, China, this 21st day of February, 1934.

(Signed) CORNELL S. FRANKLIN

United States of America
Extraterritorial Jurisdiction in China
Consular District of Shanghai—ss:

Cornell S. Franklin being first duly sworn deposes and says: That he is the defendant in the above entitled action, that he has read the above and foregoing Answer to the Complaint of the plaintiff herein and knows the contents thereof, and alleges that the same is true of his own knowledge.

(Signed) CORNELL S. FRANKLIN

Subscribed and sworn to before me this 21st day of February, 1934.

(Signed) W. T. COLLINS
Clerk of the United States Court for China
L. T. KENAKE
Assistant Clerk [9]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, June 18th, 1934.

STIPULATION

It is hereby stipulated by and between the parties hereto that Plaintiff may file the amended complaint attached hereto, and service of a copy thereof is hereby accepted.

Shanghai, China, June 15th, 1934.

(Signed) P. F. FAISON
Attorney for Plaintiff
C. S. FRANKLIN
Defendant. [10]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China June 18th, 1934.

AMENDED COMPLAINT

For cause of action against the Defendant, Plaintiff respectfully shows the Court as follows:

1. Plaintiff is an American citizen and resides in the city of New York, United States of America, and Defendant is an American citizen and resides in the city of Shanghai, China.

2. At all times hereinafter mentioned Plaintiff and Defendant were attorneys-at-law duly admitted and qualified to practice law in Shanghai, China, and from May 1, 1924, to January 1, 1928, were engaged in the practice of law in Shanghai as partners, under an agreement entitling Plaintiff to 60% and Defendant to 40% of the profits of the partnership business.

3. On or about February 10, 1927, Plaintiff and Defendant entered into an agreement at Shanghai, China, in words and figures as follows:

"Shanghai, February 10, 1927.

C. S. Franklin, Esq.,
Shanghai.

Dear Cornell:

This will serve to confirm the arrangement which we made in connection with my impending departure.

I will take a vacation, ending on January 1, 1928, during which time I will continue to receive my share of the profits of the partnership and I pre-

sume I shall be liable as a partner for any partnership obligations during that period. [11]

As you know, I may or I may not return to China; the matter is indefinite. If I return the matter is simple, we go on as we have before; if I do not, you are to pay me Tls. 50,000., to accrue as profits are made on and after January 1, 1928; 6/10th of the profits to be paid to me until the sum of Tls. 50,000. has been paid, at which time the entire business shall be yours. I presume that although my interest in the profits shall continue until the sum above mentioned is paid after January 1, 1928, my liability shall cease at that time.

If the foregoing is in accordance with your understanding, please sign the same.

Faithfully yours,

Walter Chalaire

C. S. Franklin."

4. That Plaintiff did during the month of November, 1927, notify Defendant that he, Plaintiff, would not return to China, and that Plaintiff thereafter did not return to China nor has he since that time practiced law in China.

5. That Defendant has continued to practice law in China from the first day of January, 1928, to the present day.

6. From January 1st, 1928, to March 31st, 1928, inclusive, defendant made as profits in the practice of law at Shanghai, China, the sum of Shanghai Tls. 3,709.80, and pursuant to the terms of the aforesaid agreement and in part performance thereof paid to plaintiff six-tenths of the aforesaid sum

of Shanghai Tls. 3,709.80, which six-tenths was equal to Shanghai Tls. 2,225.88, and from April 1st, 1928, to April 30th, 1930, inclusive, defendant made as profits in the practice of law at Shanghai, China, a sum of money six-tenths of which is more than the sum of Shanghai Tls. 47,774.12, and defendant therefore and by reason thereof thereupon became obligated to plaintiff in the sum of Shanghai Tls. 47,774.12, being the unpaid portion of the sum of Shanghai Tls. 50,000.00 which defendant was obligated to pay to plaintiff pursuant to the terms of the aforesaid agreement. [12]

7. After April 30, 1930, plaintiff has often demanded payment from defendant of said Shanghai Tls. 47,774.12, but defendant has always refused to pay the same or any part thereof.

WHEREFORE, Plaintiff prays judgment against defendant for Tls. 47,774.12 with legal interest thereon from April 30, 1930, and for the costs of this action.

(Signed) PAUL F. FAISON
Attorney for Plaintiff.

United States of America
Extraterritorial Jurisdiction in China
Consular District of Shanghai—ss:

PAUL F. FAISON being first duly sworn deposes and says that he is the attorney for the plaintiff in the above entitled action, that he has read and signed the foregoing complaint and knows the contents thereof, and that the facts therein stated are true; that the reason this verification is

made by him and not by the plaintiff is that plaintiff is absent from China and from the jurisdiction of this court and there is no person other than affiant who is capable of verifying the complaint.

(Signed) PAUL F. FAISON

Subscribed and sworn to before me this 18th day of June, 1934, at Shanghai, China.

(Signed) WILLIAM T. COLLINS
Clerk, United States Court for China.

(Signed) L. T. KENAKE
Asst. Clerk [13]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, this 30th day of June, 1934.

ANSWER TO AMENDED COMPLAINT

Now comes the defendant above named and for answer unto the plaintiff's amended complaint admits, denies and alleges as follows:

1. The defendant admits the allegations contained in paragraphs 1, 2, 3, 4, 5, and 7 of the plaintiff's amended complaint.

2. For answer unto paragraph 6 of the plaintiff's amended complaint the defendant admits having made as profit in the practice of law at Shanghai, China, the sum of Shanghai Tls. 3,709.50 from January 1st, 1928, to March 31st, 1928, inclusive, and admits having paid to plaintiff the 6/10 thereof pursuant to the terms of the agree-

ment set forth in paragraph 3 of the plaintiff's amended complaint and in part performance of said agreement, and further admits having made as profit in the practice of law at Shanghai, China, a sum of money 6/10 of which is more than the sum of Shanghai Tls. 47,774.12 from April 1, 1928, to April 30, 1930, but denies the other allegations in said paragraph contained.

3. For further answer unto plaintiff's complaint the defendant alleges that he agreed to pay to plaintiff 60% of the net profits of the law practice or business carried on in China after January 1, 1928, by the defendant under the firm name and style of Chalaire & Franklin until a total sum of Shanghai [14] Tls. 50,000 had been paid; that he duly paid to plaintiff such percentage of the net profit of the law practice or business carried on by him under the firm name and style of Chalaire & Franklin until March 31, 1928, when the defendant ceased the practice of law under the firm name and style of Chalaire & Franklin and abandoned the goodwill attaching to the name of Chalaire & Franklin.

FIRST SEPARATE AND DISTINCT DEFENSE

For a further, separate and distinct defense to plaintiff's amended complaint the defendant alleges:

1. The defendant repeats the admissions, denials and allegations contained in paragraphs 1 to 3 inclusive above.

2. The defendant further alleges that there was no consideration for his execution of the agreement

contained in paragraph 3 of the plaintiff's amended complaint or for his undertakings contained in said agreement.

SECOND SEPARATE AND DISTINCT DEFENSE

For a further, separate and distinct defense to plaintiff's amended complaint the defendant alleges:

1. The defendant repeats the admissions, denials and allegations contained in paragraphs 1 to 3 inclusive above.

2. The defendant further alleges that if there was legal consideration for his execution of the agreement contained in paragraph 3 of the plaintiff's amended complaint and for his undertakings in said agreement contained, an important part of such consideration was plaintiff's promise to secure in the United States, lucrative legal business and send the same to the defendant in China.

3. The plaintiff failed to make good his promise to send lucrative legal business to the defendant from the United States and by reason of such thereof there was a failure of consideration for defendant's undertakings in said agreement contained. [15]

THIRD SEPARATE AND DISTINCT DEFENSE

For a further, separate and distinct defense to plaintiff's amended complaint the defendant alleges:

1. The defendant repeats the admissions, denials and allegations contained in paragraphs 1 to 3 inclusive above.

2. The defendant further alleges that the Statute of Limitations has run against the claim hereby sued upon.

*   *   *   *   *   *

WHEREFORE defendant prays that plaintiff's amended complaint be dismissed at plaintiff's cost.

Dated at Shanghai, China, this 30th day of June, 1934.

(Signed) CORNELL S. FRANKLIN

United States of America
Extraterritorial Jurisdiction in China
Consular District of Shanghai—ss.

CORNELL S. FRANKLIN being first duly sworn deposes and says: That he is the defendant in the above entitled action, that he has read the above and foregoing Answer to the Amended Complaint of the plaintiff herein and knows the contents thereof, and alleges that the same is true of his own knowledge.

(Signed) CORNELL S. FRANKLIN

Subscribed and sworn to before me this 30th day of June, 1934.

(Signed) WILLIAM T. COLLINS
Clerk of the United States Court for China
(Signed) L. T. KENAKE, Asst. Clerk [16]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, this 14th day of August, 1934.

MOTION FOR JUDGMENT ON THE PLEADINGS

To the Clerk of the United States Court for China and Cornell S. Franklin, Esquire—

Please take notice that the Plaintiff will on the 15th day of September, 1934, at the United States Court for China in the city of Shanghai, China, at the hour of ten o'clock A. M. of said day, or as soon thereafter as counsel can be heard, move the Honorable Milton J. Helmick, the Judge of said Court, for judgment on the pleadings in the above entitled action, on the ground that defendant's answer to plaintiff's amended complaint fails to raise an issue of fact for decision by the court.

This motion will be based upon the pleadings on file in said action.

Dated at Shanghai, China, this 14th day of August, 1934.

P. F. FAISON
Attorney for Plaintiff [17]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, September 14, 1934.

OPINION

Plaintiff sued defendant for breach of contract and defendant filed an answer containing new mat-

ter by way of affirmative defense, whereupon both parties moved for judgment on the pleadings. Among other matters of defense, defendant pleads the bar of the Statute of Limitations, and consequently that question must be determined at the outset. According to the allegations of the complaint, plaintiff's cause of action accrued on or before April 20th, 1930. Whether or not plaintiff's cause of action is barred depends upon whether the 3-year period of the District of Columbia Code or the 6-year period of the Consular Court Regulations of 1864 is the law of this jurisdiction. Plaintiff argues, and it is assumed here, that the matter of limitation of actions is not substantive law but only procedural or remedial law, which could properly be the subject of Consular Court Regulations.

The confusion which has existed on this question in the past was due to the decision in the early case of United States vs. Engelbracht, 1 Extraterritorial Cases, 169, which held that Consular Court Regulations prevailed, even over inconsistent acts of Congress not expressly relating to this juris- [18] diction, because United States Revised Statutes, Section 4118 made the regulations binding "until annulled or modified by Congress."

The rules, which were promulgated by the American Minister to China in 1864 under authority of this Statute, are quite meagre and apply only to actions at law and not to suits in equity. Under the act creating this Court they were carried over "so far as practicable" and could be modified or supplemented by the Judge, but no modern Court

of Record could very well function with the obsolete procedural equipment they furnish. Even during the existence of the Consular Court system, before the creation of this Court, the particular rule on limitation of actions which is involved here was considered by no less distinguished an authority than Mr. Bayard, Secretary of State, to be a rule of Court and not a statutory mandate, and that it could be varied as justice might require.—See Hinckley's American Consular Jurisdiction in the Orient, p. 55.

The basic thing to be remembered is that by United States Revised Statutes, Section 4083-4130, the laws of the United States, the Common Law and the Law of Equity and Admiralty were extended to this jurisdiction, and that this Court, as the successor of the Consular Courts, administers all these laws. [19] In making this blanket extension, Congress did not except the procedural field of law. It is true, Congress in creating the United States Court for China endowed it with the doubtful benefit of existing Consular Court Rules of procedure, but the grant was qualified by the words "so far as practicable," and it can not be thought the Regulations were made the exclusive procedural law of the Court. In the noted case of Biddle vs. United States, the United States Circuit Court of Appeals of the 9th Circuit ruled that the statute laws of the District of Columbia are among the laws of the United States extended to this jurisdiction, and since that decision the District of Columbia Code Statute of Limitations passed in 1901, is

a law of the United States and an expression of Congressional will on the subject. That this statute, apart from the conflict with the regulation, is wholly applicable and suitable to this jurisdiction, is not questioned, but it is argued that Congress did not have China in mind when enacting it and therefore there was no Congressional intention to override the Consular Court rule in force here. The same thing could be said of most of the laws of the United States which have been extended. It cannot be supposed that an empirical Consular Court Regulation can stand if contrary to a law of the United States, and it must be held that laws of the United States not unsuitable to this jurisdiction prevail a fortiori.

In creating the United States Court for China with a complete staff, a Judge, "a District Attorney, a Marshal and a Clerk, with authority possessed by corresponding officers of the District Courts of the United States," Congress at least created something in the image of a Federal Court. The Federal equity rules promulgated by the Supreme Court of the United [20] States under authority of Congress have always governed the practice of this Court on the equity side. The last Congress passed an act giving the Supreme Court additional authority to make procedural rules for Federal Courts for law cases as well, and in a short time the procedure of all Federal Courts, both on the law and equity sides, will be prescribed completely by rules of the Supreme Court. When this is accomplished, uncertainty as to procedure in the

United States Court for China should be ended. No one, it is hoped, will have the temerity to suggest these rules will be barred by the existence of the venerable Consular Court Rules.

Since it is held plaintiff's cause of action is barred by the District of Columbia Statute of Limitations in force here, it is unnecessary to consider the other issues raised by the motions. Complaint will be dismissed.

(Signed) MILTON J. HELMICK
Judge [21]

In the United States Court for China

Cause No. 3628
Civil No. 1659

WALTER CHALAIRE, Plaintiff,

vs.

CORNELL S. FRANKLIN, Defendant.

[Endorsed]: Filed at Shanghai, China, this 26th day of November, 1934.

JUDGMENT

This cause came on regularly for hearing upon plaintiff's motion for judgment upon the pleadings, and the defendant in open court having also moved for judgment upon the pleadings, to which plaintiff then and there objected, and the court having heard arguments of counsel and having filed its Opinion herein, and now being fully advised finds that the

judgment justified by the pleadings should go for the defendant to which plaintiff excepts.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the complaint of plaintiff be dismissed, that defendant go hence without day, and have his costs herein expended, to which plaintiff excepts.

MILTON J. HELMICK
Judge. [22]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, this 15th day of December, 1934.

EXCEPTION TO JUDGMENT DISMISSING COMPLAINT

Now comes the Plaintiff by his attorney, Paul F. Faison, and excepts to the Judgment of the Court entered herein on the 26th day of November, 1934, for the following reasons:

1. That the Court erred in considering, over Plaintiff's objection, defendant's oral motion for judgment on the pleadings made during the progress of the hearing of plaintiff's written motion for judgment on the pleadings.

2. That the Court erred in considering defendant's third special defense for the reason that defendant failed to allege in said plea the facts upon which he relied to show when plaintiff's cause of action accrued, or when the statute of limitations commenced to run, or what statute he relied upon as a bar.

3. That the Court erred in holding that section 341, Title 24, of the District of Columbia Code promulgated in 1930, (being section 1265 of the District of Columbia Code of 1901), providing that no action shall be brought—upon any simple contract, express or implied,—after three years from the time when the right to maintain such action shall have accrued, is the law of this jurisdiction.

4. The Court erred in not holding that section 83 of the Consular Court Regulations, prescribing that civil actions based on a written promise, contract, or instrument must be [23] commenced within six years after the cause of action accrues, and other civil actions within two years, is the law of this jurisdiction.

5. That the Court erred in holding that plaintiff's cause of action accrued on or before April 20, 1930.

6. That the Court erred in inferring and concluding that the allegations contained in the amended complaint were inconsistent with the plaintiff's cause of action arising or the statute of limitations commencing to run within three years immediately preceding the filing of the complaint or the amended complaint herein.

7. That the Court erred in rendering judgment against the plaintiff on the pleadings.

8. That the Court erred in not giving plaintiff judgment against defendant on the pleadings.

Dated at Shanghai, China, this 14th day of December, 1934.

P. F. FAISON

Attorney for the Plaintiff. [24]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, this 21st day of December, 1934.

PETITION FOR APPEAL

The above named, Walter Chalaire, considering himself aggrieved by the judgment made and entered on the 26th day of November, 1934, in the above entitled cause, does hereby appeal from said judgment to the United States Circuit of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

P. F. FAISON
Attorney for Plaintiff [25]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, this 21st day of December, 1934.

ASSIGNMENT OF ERRORS

Comes now the said WALTER CHALAIRE, plaintiff in the above cause, and files the following assignment of errors upon which he will rely upon the prosecution of the appeal herewith petitioned

for in said cause from the judgment of this Court entered on the 26th day of November, 1934:

1. The Court erred in considering, over Plaintiff's objection, defendant's oral motion for judgment on the pleadings made during the progress of the hearing of plaintiff's motion for judgment on the pleadings.

2. The Court erred in considering defendant's third special defense for the reason that defendant failed to allege in said plea the facts upon which he relied to show when plaintiff's cause of action accrued, or when the statute of limitations commenced to run, or what statute he relied upon as a bar.

3. The Court erred in holding that section 341, Title 24, of the District of Columbia Code promulgated in 1930, (being section 1265 of the District of Columbia Code of 1901), providing that no action shall be brought—upon any simple contract, express or implied,—after three years from the time when the right to maintain such action shall have accrued, is the law of this jurisdiction. [26]

4. The Court erred in not holding that section 83 of the Consular Court Regulations, prescribing that civil actions based on a written promise, contract, or instrument must be commenced within six years after the cause of action accrues, and other civil actions within two years, is the law of this jurisdiction.

5. The Court erred in holding that plaintiff's cause of action accrued on or before April 20, 1930.

6. The Court erred in inferring and concluding

that the allegations contained in the amended complaint were inconsistent with the plaintiff's cause of action arising or the statute of limitations commencing to run within three years immediately preceding the filing of the complaint or the amended complaint herein.

7. The Court erred in rendering judgment against the plaintiff on the pleadings.

8. The Court erred in not giving plaintiff judgment against defendant on the pleadings.

WHEREFORE, plaintiff prays that the said judgment may be reversed and for such other and further relief as to the Court may seem just and proper.

P. F. FAISON
Attorney for Plaintiff. [27]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, this 21st day of December, 1934.

ORDER ALLOWING APPEAL

This day came the plaintiff by his attorneys and presented to the Court his petition for an allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, which petition upon consideration by the Court is hereby allowed, and the Court allows an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, upon the filing of a bond in the sum of United States currency Dollars Two Hundred and Fifty

(U. S. $250.00) with good and sufficient security to be approved by the Court.

By the Court
MILTON J. HELMICK
Judge [28]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, this 31st day of December, 1934.

APPEAL BOND

KNOW ALL MEN BY THESE PRESENTS: That we, Walter Chalaire, as principal, and Columbia Casualty Company of New York, as surety, are held and firmly bound unto Cornell S. Franklin, in the full and just sum of United States Dollars Two Hundred and Fifty (U. S. $250.00) to be paid unto said Cornell S. Franklin, his heirs, executors, administrators, successors or assigns, to which payment, well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals, and dated this 31st day of December, 1934.

WHEREAS, lately, at the United States Court for China, in a suit depending in said Court between Walter Chalaire, plaintiff, and Cornell S. Franklin, defendant, a judgment was entered against the said Walter Chalaire and the said Walter Chalaire has petitioned for and been allowed by said Court an appeal to be made to the United

States Circuit Court of Appeals for the Ninth Circuit and a citation has been issued and directed to the said Cornell S. Franklin, citing him to appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City and County of San Francisco in the Northern District of the State of California, thirty (30) days from and after the date of this citation. [29]

NOW, the condition of the above obligation is such that if the said Walter Chalaire shall prosecute said appeal to effect and answer all costs if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

WALTER CHALAIRE, Principal
By: PAUL F. FAISON
His Attorney in Fact

COLUMBIA CASUALTY COMPANY OF NEW YORK, Surety.
(Signed) By: W. J. GULLIVER

ACKNOWLEDGMENT

United States of America
Extraterritorial Jurisdiction in China,
Consular District of Shanghai—ss.

The affiant, Paul F. Faison, being first duly sworn, deposes and says that he is the person who executed the foregoing instrument as Attorney in Fact of Walter Chalaire, that he was duly authorized thereunto by the said Walter Chalaire,

and that the execution of this bond is the free act and deed of the said Walter Chalaire.

PAUL F. FAISON.

IN WITNESS WHEREOF, I have hereunto set my hand and affix my official seal at Shanghai, China, the day and year first above written.

WILLIAM T. COLLINS
Clerk of the United States Court for China

L. T. KENAKE, Asst. Clerk. [30]

ACKNOWLEDGMENT

United States of America,
Extraterritorial Jurisdiction in China,
Consular District of Shanghai.—ss.

The affiant, William James Gulliver, being first duly sworn, deposes and says that he is the accident manager, for China, of the Columbia Casualty Company of New York; that the same is an American company incorporated under the laws of the State of New York, and doing business in the City of Shanghai, China; and under the Articles of Incorporation of said company it is authorized to execute such an instrument in the name of the company; and that he acknowledges the execution of the foregoing bond to be the free act of said company for the purposes therein expressed.

(Signed) W. J. GULLIVER.

IN WITNESS WHEREOF, I have hereunto set my name and affix my official seal at Shanghai, China, the day first above written.

WILLIAM T. COLLINS
Clerk of the United States Court for China.
L. T. KENAKE, Asst. Clerk

The foregoing bond is hereby approved this 31st day of December, 1934.

MILTON J. HELMICK
Judge of the United States
Court for China. [31]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, this 24th day of December, 1934.

CITATION ON APPEAL

United States of America,
United States Court for China.—ss.

The President of the United States to Cornell S. Franklin:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City and County of San Francisco, in the Northern District of the State of California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal from the United States Court for China, in a suit wherein Walter Chalaire is appellant and you are appellee, to show cause, if any there be, why

the judgment rendered against said Walter Chalaire, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Milton J. Helmick, Judge of the United States Court for China, this twenty-fourth day of December, 1934, and in the 158th year of the Independence of the United States of America.

[Seal] MILTON J. HELMICK
Judge
United States Court for China

Service copy of the foregoing citation is acknowledged by me this 27th day of December, 1934.

CORNELL S. FRANKLIN
Defendant [32]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, this 21st day of December, 1934.

ORDER

For satisfactory reasons appearing to the Court, the time for filing the record in this case in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the appeal sued out, is extended until the 15th day of February, 1935.

By the Court
MILTON J. HELMICK
Judge [33]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, this 3rd day of January, 1935.

PRAECIPE FOR TRANSCRIPT OF RECORD

To Clerk of the above named Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following, and no other papers and exhibits, to wit:

1. Plaintiff's complaint.
2. Defendant's answer.
3. Stipulation allowing filing of amended complaint.
4. Plaintiff's amended complaint.
5. Defendant's answer to amended complaint.
6. Plaintiff's motion for Judgment on the pleadings.
7. Opinion of the Court.
8. Judgment of Court.
9. Exception to judgment of Court.
10. Petition for allowance of appeal.
11. Assignment of errors.
12. Order allowing appeal.
13. Appeal bond.
14. Citation on appeal.
15. Order extending time for filing record of appeal.
16. This praecipe.

P. F. FAISON
Attorney for Plaintiff [34]

[Title of Court and Cause.]

[Endorsed]: Filed at Shanghai, China, this 5th day of January, 1935.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

United States of America,
Extraterritorial Jurisdiction in China,
Consular District of Shanghai.—ss.

In accordance with the order allowing appeal, a copy of which is set forth in the foregoing, I, William T. Collins, Clerk of the United States Court for China, hereby transmit a true copy of the record, assignment of errors, and other documents filed in the above-entitled cause, consisting of pages 1 to 35, inclusive, lately pending in the United States Court for China, under my hand and the seal of said Court.

And I do certify that the costs of preparation of this record are nil, the said record having been prepared by the plaintiff (plaintiff in error) herein.

WITNESS my official signature and the seal of the said United States Court for China, at the City of Shanghai, China, within the jurisdiction of said Court, this 5th day of January, 1935.

[Seal] WILLIAM T. COLLINS
Clerk, United States Court
for China [35]

[Endorsed]: Transcript of Record. Filed January 24, 1935. Paul P. O'Brien, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

1420

No. 7753

United States
Circuit Court of Appeals
For the Ninth Circuit

Walter Chalaire,

Appellant,

vs.

Cornell S. Franklin,

Appellee.

BRIEF FOR APPELLANT.

Farnham P. Griffiths,
George E. Dane,
McCutchen, Olney, Mannon & Greene,
1500 Balfour Bldg., San Francisco, Calif.
Attorneys for Appellant.

Walter Chalaire,
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Of Counsel.

FILED
NOV 14 1935
PAUL P. O'BRIEN,
CLERK

Parker Printing Co., 545 Sansome Street, San Francisco

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II. Analysis of the Pleadings 4

They show action brought more than three and less than six years after cause of action accrued for breach of the following written contract:

"Shanghai, February 10, 1927.

C. S. Franklin, Esq.,
Shanghai.

Dear Cornell:

This will serve to confirm the arrangement which we made in connection with my impending departure.

I will take a vacation, ending on January 1, 1928, during which time I will continue to receive my share of the profits of the partnership and I presume I shall be liable as a partner for any partnership obligations during that period.

As you know, I may or I may not return to China; the matter is indefinite. If I return the matter is simple, we go on as we have before; if I do not, you are to pay me Tls. 50,000., to accrue as profits are made on and after January 1, 1928; 6/10ths of the profits to be paid to me until the sum of Tls. 50,000. has been paid, at which time the entire business shall be yours. I presume that although my interest in the profits shall continue until the sum above mentioned is paid after January 1, 1928, my liability shall cease at that time.

If the foregoing is in accordance with your understanding, please sign the same.

Faithfully yours,

Walter Chalaire,
C. S. Franklin."

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The pleadings show that the plaintiff performed his part of this agreement by forbearing to return to China; that the defendant paid 2,225.88 taels out of the amount promised and refused to pay the balance of 47,774.12 taels. Prayer of the complaint is for this balance.

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No. 7753

United States Circuit Court of Appeals

For the Ninth Circuit

WALTER CHALAIRE, *Appellant,* vs. CORNELL S. FRANKLIN, *Appellee.*	

Memorandum In Opposition to Appellee's Motion to Affirm.

(For Insertion in Brief for Appellant in Accordance with Order of Court Following Oral Argument.)

The motion is without merit. The appeal is on the judgment roll and more specifically on the pleadings. There was no trial. Plaintiff and defendant each moved for judgment on the pleadings. Judgment was given for defendant and the appeal taken by the plaintiff.

On such an appeal, special findings of fact and conclusions of law, requests for rulings on points of law with exceptions thereto, and bills of exceptions are unnecessary. The errors are apparent on the judgment roll.

Nalle v. Oyster, 230 U. S. 165, 176-177; 57 L. Ed. 1439; 33 Sup. Ct. 1043;

St. Paul M. & M. Ry. Co. v. Drake (C. C. A. 9th), 72 Fed. 945, 947;

Mitsui v. St. Paul F. & M. Ins. Co. (C. C. A. 9th), 202 Fed 26, 28; Certiorari denied 231 U. S. 749; 34 Sup. Ct. 321; 58 L. Ed. 465.

Cases cited by appellee, such as

> *Fleischman v. U. S.*, 270 U. S. 349;
>
> *First Nat. Bk. of San Rafael v. Philippine Refining Corp.* (C. C. A. 9th), 51 Fed. (2d) 218;

and

> *Pickering & Co. v. Chinese American Assn.* (C. C. A. 9th), 71 Fed. (2d) 895;

do not hold otherwise. Bills of exceptions, special findings, etc., were declared requisite in these cases because there had been trials and evidence or rulings in the course of the trials were sought to be reviewed. The cases expressly recognize that these formalities are not necessary where it is sought to review only "errors apparent from an inspection of the pleadings, process and judgment" [Judge Rudkin in *Wulfsohn v. Russo-Asiatic Bk.* (1926), 11 Fed. (2d) 715, where this court reviewed the statute of limitations as a question arising on the judgment roll (pleadings)].

No replication is required under the practice in the United States Court for China.

> *American Trading Co. v. Steele* (C. C. A. 9th 1921), 274 Fed. 774, 781.

For the opinion of the court below (Judge Lobingier) see

> *Steele v. American Trading Co.* (1920), 1 Extra-Territorial Cases 964, 972, 973.

See also Judge Lobingier's opinion to the same effect in

> *Chiu v. Wagman* (1922), 2 Extra-Territorial Cases 360;

and

> *Consular Court Regulations*, printed on p. 226 ff. in Hinckley's *American Consular Jurisdiction in the Orient*.

Respectfully submitted,

Farnham P. Griffiths,
George E. Dane,
McCutchen, Olney, Mannon & Greene,
Attorneys for Appellant.

Walter Chalaire,
Paul F. Faison,
Of Counsel.

No. 7753

United States Circuit Court of Appeals

For the Ninth Circuit

WALTER CHALAIRE, *Appellant,* vs. CORNELL S. FRANKLIN, *Appellee.*	

BRIEF FOR APPELLANT.

I.

Statement of the Case.

This is an appeal from a judgment of the United States Court for China, taken pursuant to Section 3 of the Act of June 30, 1906.*

The appellant, Chalaire, was the plaintiff in the court below. The appellee, Franklin, was the defendant. They are referred to in this brief as plaintiff and defendant.

The action was for breach of a written contract. Plaintiff and defendant had been partners in the practice of the law at Shanghai. Plaintiff was leaving to take a vaca-

*34 Stat. 814, U. S. Code Tit. 22, Sec. 194.

tion in the United States and this contract was made at Shanghai on the eve of his departure. The full text of the contract appears at page 12 of the transcript and is set out in the Analysis of the Pleadings in the next chapter of this brief. In substance the defendant undertook to pay plaintiff 50,000 Shanghai taels over a period of time as provided in the contract if plaintiff would forebear returning to China at the end of his holiday. Plaintiff did so forebear. Defendant paid only 2,225.88 taels of the 50,000 and refused to pay any more. The suit charges breach of contract and prays for the balance of 47,774.12 taels, with interest and costs.

The case was determined below and is presented to this court on the pleadings alone. Deeming that the answer admitted all material allegations of the complaint and set up no valid defense, the plaintiff moved for judgment on the pleadings. The defendant countered with an oral motion for judgment in his favor. The court granted the defendant's motion and dismissed the complaint upon the ground that the action was barred by "the three year period of the District of Columbia Code."

On this appeal by the plaintiff error is assigned not only to the judgment of dismissal entered on defendant's motion, but also to the failure of the court to grant plaintiff's motion for judgment in his favor on the pleadings. Hence if this court agrees with our contentions it will not only reverse the judgment below but in its mandate will direct the entry of judgment for plaintiff.

In essence the questions raised are:

(1) Was the court right in holding the action barred by the 3 year statute of the District of Columbia? It is

the position of the plaintiff: (a) that the District of Columbia Statute of Limitations has no application whatever to actions in the United States Court for China; (b) that the only limitations sanctioned by the statute which created that court are those prescribed by the Consular Court Regulations of 1864, which require an action on a written contract to be brought, as this action was, within six years from the time when the cause of action accrued; and (c) that the court below fell into error through misinterpretation of the decision rendered by this court in 1907, in

Biddle v. United States, No. 1463, 156 Fed. 759.

(2) If the Consular Court Regulations applied, and the action therefore was timely, was a cause of action for breach of contract sufficiently stated in the complaint and so far admitted in the answer as to require judgment for plaintiff on the pleadings? We so contend, and urge that none of the defenses set up in the answer is valid.

Before proceeding to the argument, and in order to show how these questions are raised, an analysis of the pleadings is in order.

II.

Analysis of the Pleadings.

The action was instituted by complaint filed February 1, 1934, to which an answer was duly filed by the defendant. This original complaint and answer were brought up as part of the record and appear in the transcript (Tr. pp. 2-11). But since they were displaced by amended complaint filed pursuant to stipulation, and answer thereto (Tr. pp. 11-18), the earlier pleadings are of importance only to show when the action was originally brought and that no new cause of action was introduced by the amendment.

Directing our attention now, therefore, to the amended complaint and the answer thereto, we find that the following facts alleged in the complaint have been admitted:

The plaintiff and the defendant engaged together as partners in the practice of law at Shanghai from May 1, 1924 to January 1, 1928, under an agreement whereby the profits of the partnership business were shared in the proportion of 60 per cent to the plaintiff and 40 per cent to the defendant. During the continuance of this partnership and on or about February 10, 1927, plaintiff Chalaire and defendant Franklin entered into the following written agreement, in the form of a letter from plaintiff to defendant:

"Shanghai, February 10, 1927.

C. S. Franklin, Esq.,
Shanghai.

Dear Cornell:

This will serve to confirm the arrangement which we made in connection with my impending departure.

I will take a vacation, ending on January 1, 1928, during which time I will continue to receive my share of the profits of the partnership and I presume I shall be liable as a partner for any partnership obligations during that period.

As you know, I may or I may not return to China; the matter is indefinite. If I return the matter is simple, we go on as we have before; if I do not, you are to pay me Tls. 50,000., to accrue as profits are made on and after January 1, 1928; 6/10ths of the profits to be paid to me until the sum of Tls. 50,000. has been paid, at which time the entire business shall be yours. I presume that although my interest in the profits shall continue until the sum above mentioned is paid after January 1, 1928, my liability shall cease at that time.

If the foregoing is in accordance with your understanding, please sign the same.

Faithfully yours,
WALTER CHALAIRE
C. S. FRANKLIN"

The plaintiff left on his contemplated vacation. During the month of November, 1927, plaintiff notified defendant that he had determined not to return to China and plaintiff has not since returned to China or practiced law there, but the defendant has continued to practice law in China up to the time of the institution of this suit.

It is conceded that the plaintiff received full payment of his 60 per cent share of the profits of the partnership during the period of plaintiff's vacation ending January 1, 1928, and 60% of the amount earned by defendant during the

further period from January 1 to March 31, 1928. The defendant admits having made as profit in the practice of law at Shanghai from April 1, 1928 to April 30, 1930, a sum of money 6/10ths of which is more than the sum of 47,774.12 Shanghai taels, the balance claimed by the plaintiff to be due him under the above agreement after deduction of payments (2,225.88 Shanghai taels) already made in respect of the period from January 1 to March 31, 1928.

Defendant alleges as his reason for paying plaintiff no share of the profits made after March 31, 1928, that he had agreed to share with the plaintiff the profits of the law practice or business carried on by the defendant "under the firm name and style of Chalaire & Franklin" until a total sum of 50,000 Shanghai taels had been paid, and that he had continued to pay the plaintiff his percentage so long as he practiced under that firm name, i. e., until March 31, 1928, when defendant ceased to practice under that name and abandoned the good will attaching thereto.

As separate defenses, the answer alleged:

1. That there was no consideration for the defendant's execution of the agreement sued on;

2. That if there was any legal consideration, an important part of it was plaintiff's promise to secure in the United States lucrative legal business and to send the same to the defendant in China, that plaintiff had failed to do so and that by reason thereof there was a failure of consideration for the defendant's undertakings contained in the agreement.

3. "That the Statute of Limitations has run against the claim hereby sued upon."

In this state of the record the plaintiff, pursuant to written notice, moved for judgment on the pleadings. This motion, as already noted, was countered at the time of hearing by an oral motion of the defendant for judgment in his favor. The court granted the latter motion and entered judgment for defendant upon the ground (as disclosed by the opinion, Tr. p. 20) that "plaintiff's cause of action accrued on or before April 20th, 1930," and was therefore barred by "the 3-year period of the District of Columbia Code" of 1901, i. e., by Sec. 1265 of "An Act to establish a code of law for the District of Columbia", approved Mar. 3, 1901, 31 Stat. 1189, 1389, incorporated in the 1930 edition of the Code as Sec. 341 of Title 24.

The errors which plaintiff asserts were committed by the court below and which he intends to urge on this appeal are set out separately and particularly as follows:

III.

Specification of Errors.

1. The court erred in holding that the limitation of actions in the United States Court for China is governed by Section 1265 of the District of Columbia Code of 1901, 31 Stat. 1389, which provides that no action shall be brought upon any simple contract, express or implied, after three years from the time when the right to maintain such action shall have accrued. Assignment 3.

2. The court erred in not holding that the limitation of actions in the United States Court for China is governed by Section 83 of the Consular Court Regulations for

China, promulgated April 23, 1864, and providing that civil actions based on written promise, contract or instrument must be commenced within six years after the cause of action accrues. Assignment 4.

3. The court erred in holding that plaintiff's cause of action accrued on or before April 20, 1930. Assignment 5.

4. The court erred in rendering judgment against the plaintiff on the pleadings. Assignment 7.

5. The court erred in not giving plaintiff judgment on the pleadings. Assignment 8.

As to the third point specified above (Assignment 5) no argument is necessary. It refers merely to a clerical or typographical error in the opinion (Tr. p. 20) which gives as the date of accrual of the cause of action April 20th, 1930, instead of April *30th*, 1930, the finding which must have been intended (Tr. pp. 14, 16). This error is specified only to avoid confusion. It is not material, for either April 20 or April 30, 1930, is more than 3 years and less than 6 years prior to February 1, 1934, when this action was filed. So, also, for that matter, is April 1, 1928, the earliest date when plaintiff's cause of action can possibly be thought to have accrued. There is therefore no need for argument as to the exact date when the cause of action did accrue. For the purposes of this appeal it is enough to say that it certainly accrued more than 3 and less than 6 years before this action was filed, and that whether or not it is barred depends upon whether the 3 year statute of the District of Columbia, or the 6 year limitation of the Consular Court Regulations should be applied. It is to this point, accordingly, that the first chapter of the argument is addressed.

IV.

Brief of the Argument.

A. THE COURT BELOW ERRED IN DISMISSING THE COMPLAINT AS BARRED BY LIMITATION.

1. THE TRIAL COURT WAS BOUND BY SECTION 5 OF ITS ORGANIC ACT TO APPLY THE SIX YEAR LIMITATION PRESCRIBED BY SECTION 83 OF THE CONSULAR COURT REGULATIONS OF 1864, UNDER WHICH THIS ACTION WAS FILED IN TIME.

The act of June 30, 1906, by which the court below was created, directed, in Section 5,

> "*That the procedure of the said court shall be in accordance, so far as practicable, with the existing procedure prescribed for consular courts in China in accordance with the Revised States of the United States.* . . ."*
>
> (Act June 30, 1906, Sec. 5, 34 Stat. 814, 816.)

The only "procedure prescribed for the Consular Courts in China", and "existing" on June 30, 1906, was that contained in the Consular Court Regulations for China, promulgated by the ministers "in accordance with the Revised Statutes of the United States", Sections 4117, 4118 and 4119. The original text of the statutory authority is found in the Act of Congress of June 22, 1860, 12 Stat. 72, which provides:

> Section 5. "* * * That in order to organize and carry into effect the system of jurisprudence de-

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*Italic emphasis throughout this brief is ours unless otherwise noted. Further provisions of the above section are quoted on page 17, *infra*.

manded by such treaties [granting rights of extra-territoriality to citizens of the United States in China, Japan and Siam] respectively, the said ministers, with the advice of the several consuls in each of the said countries, respectively, or so many of them as can be conveniently assembled, *shall prescribe the forms of all processes* which shall be issued by any of said consuls; *the mode of executing and the time of returning the same* * * * and, generally, without further enumeration, to make all such decrees and regulations from time to time, under the provisions of this act, as the exigency may demand; and all such regulations, decrees, and orders shall be plainly drawn up in writing, and submitted, as above provided, for the advice of the consuls, or as many of them as can be consulted without prejudicial delay or inconvenience, who shall each signify his assent or dissent in writing, with his name subscribed thereto; and after taking such advice, and considering the same, the minister, in the said countries, respectively, may, nevertheless, by causing the decree, order or regulation to be published with his signature thereto, and the opinions of his advisers inscribed thereon, make it to become binding and obligatory, until annulled or modified by Congress; and it shall take effect from the publication or any subsequent day thereto named in the act."

Section 6. "* * * That all such regulations, orders, and decrees, shall, as speedily as may be after publication, be transmitted by the said ministers, with the opinions of their advisers, as drawn up by them severally, to the Secretary of State, to be laid before Congress for revision."

These provisions are now contained in Chapter 2, Sections 146, 147 and 148, of Title 22 of the United States Code, adopted by Congress June 30, 1926. Section 5 of the Act of 1906, above quoted, as incorporated in Section 196 of Chapter 3, Title 22 of the Code, now reads:

> "The procedure of the United States Court for China shall be in accordance, so far as practicable, with the *procedure prescribed* for consular courts in China *in accordance with chapter 2 of this title* * * *"

An examination of "Chapter 2 of this title" (Title 22) leaves no doubt that Congress could only have referred to the aforementioned Sections 146, 147 and 148 of that chapter, which are in effect the provisions of the Act of 1860 above quoted, whereby the ministers were authorized to prescribe procedure for the consular courts in China. It is the "procedure prescribed" by the ministers thereunder that Congress has directed the United States Court for China to follow. We therefore look to the acts of the ministers.

"In accordance with" his statutory authority Minister Anson Burlingame, on April 23, 1864, promulgated a set of regulations entitled, "Regulations for the consular courts of the United States of America in China." These regulations consist of 106 sections divided under eighteen chapter heads, all relating to different phases of procedure. They constitute, in effect, a short procedural code. The first chapter, for example, entitled "Ordinary Civil Proceedings", classifies civil actions, provides for service of process, default, attendance of witnesses, execu-

tions, costs, etc. Other chapters deal with tender, reference, habeas corpus, divorce, criminal proceedings, etc. Chapter XV is entitled "Limitation of Actions and Prosecutions". Its three sections are as follows:

> "82. *Criminal.*—Heinous offences not capital must be prosecuted within six years; minor offences within one.
>
> "83. *Civil.*—Civil actions, based on written promise, contract, or instrument, must be commenced within six years after the cause of action accrues; others within two.
>
> "84. *Absence; fraudulent concealment.*—In prosecutions for heinous offences not capital, and in civil cases involving more than $500, any absence of respondent or defendant for more than three months at a time from China shall be added to the limitation; and in civil cases involving more than $100, the period during which the cause of action may be fraudulently concealed by defendant shall likewise be added."

In further compliance with the statute, the regulations as drawn up by Minister Burlingame were circulated among "the several consuls" in China for their "advice", and each of them gave his express assent thereto as evidenced by their ten signatures following that of Mr. Burlingame. Thereafter, on November 1, 1864, the Minister caused the regulations thus adopted and approved to be published "with his signature thereto and the opinions of his advisers inscribed thereon". The notice of publication issued at the direction of the Minister by George F. Seward, Consul General at Shanghai, re-

cites that "under the provisions of the Act of Congress they become of binding force and effect from this date. Certified copies of the decrees have gone forward for simultaneous publication at the several ports".

All of the statutory conditions precedent having been complied with, the regulations then became, under the statute, "binding and obligatory until annulled or modified by Congress", and it was the duty of the Minister to transmit them for consideration by that body. This he did by letter to Secretary of State Seward, dated at Peking, November 9, 1864. Mr. Seward replied on March 27, 1865, acknowledging receipt of the Minister's letter "and its accompaniments, relative to the regulations by which you propose to conduct the proceedings in the consular courts of China. The subject", says Mr. Seward, "will be submitted to Congress at its next session". It was so submitted. This correspondence, including the text of the regulations, was "laid before Congress" by President Johnson at the time of his annual message, December 4, 1865. It appears on pages 413 to 421 of Part II of *"Message of the President of the United States, and accompanying documents, to the two Houses of Congress, at the commencement of the first session of the Thirty-ninth Congress"*, being the second part (separately paged and bound) of Volume 1 of *"Executive Documents printed by order of the House of Representatives during the first session of the Thirty-ninth Congress,* in sixteen volumes, Washington, Government Printing Office, 1866", which may be briefly cited as Ho. Ex. Doc. Vol. I, No. 1, part 2, 39th Cong., 1st Sess., pp. 413-421. The text of the regulations will be found conveniently reprinted in Hinckley,

American Consular Jurisdiction in the Orient, 1906, pp. 226-235.

No action was ever taken by Congress to revise, annul or modify these regulations, although several years later they were again brought specifically to the attention of that body by a letter of the Secretary of State to the Chairman of the Senate Committee on Foreign Relations, Senate Misc. Doc. No. 89, Vol. I, 47th Cong., 1st Sess., pp. 1, 9-10. The text of the "Regulations in force in the Consular Courts of the United States in China" was again printed as an appendix thereto. *Ibid.,* Appendix VII, pp. 69, 75. The Secretary submitted a "Draft of Proposed Act" to prescribe uniform regulations for the exercise of the extraterritorial judicial jurisdiction. The proposed act provided for a whole system of extraterritorial courts in the Orient and prescribed uniform rules of procedure therefor, including, it is interesting to note, a six year statute of limitations for both contract and tort actions. *Ibid.,* Appendix XIV, pp. 210, 224-225. Again no action was taken by Congress. Accordingly, it must be presumed that Congress was satisfied with the Regulations as drawn up by Minister Burlingame, and that it approved them in their entirety. The principle is the same as that applied by the Supreme Court in a case involving certain laws of a territorial legislature,

> *Clinton v. Englebrecht,* 13 Wall. 434, 446, 20 L. ed. 659 (1872):

> "In the first place, we observe that the law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the statute book

> for more than twelve years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the secretary of the territory to transmit to that body copies of all laws, on or before the first of the next December in each year. The simple disapproval by Congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body."

The Consular Court Regulations of 1864, therefore, continued, with the tacit approval of Congress, "binding and obligatory", as they had been from the date of their publication. In other words, they had the force of law, for to this extent the minister had been given the power to *legislate* for citizens of the United States in China. Such was the opinion rendered with regard to similar provisions of an earlier statute by Attorney General Caleb Cushing, who, in 1844, as envoy, had negotiated our first treaty with China.

> *United States Judicial Authority in China,* 7 Op. Att'y Gen. 495, 504-505 (1855).

These Consular Court Regulations of 1864, as briefly supplemented by Ministers Angell and Denby, in 1881 and 1897,

> Hinckley, *American Consular Jurisdiction in the Orient* (1906), Appendix pp. 235-236,

were thus plainly "the existing procedure prescribed for consular courts in China" which the statute of 1906 that created the court below directed it to follow, "so far as practicable".

No reason is apparent, and none is suggested by the court below (Tr. pp. 21-22), why the limitation provisions of sections 83 and 84 of the Regulations are not "practicable" of application in the U. S. Court for China. They are succinct, definite and complete, and presumably best suited to conditions prevailing in China. So far as the limitation of 6 years for actions on written contracts is concerned, it is found "practicable" and appropriate in more than half the states of the Union. 37 states and territories allow 6 years or more, as against 14 which allow less than 6 years. Only three states, in addition to the District of Columbia, restrict the time to sue on a written contract to as little as three years.

See

2 *Wood on Limitations,* 4th ed. Appendix.

The various derogatory remarks of the court below, regarding the character of the Consular Court Regulations, are all beside the point. The description, "obsolete procedural equipment" (Tr. p. 21), certainly is not applicable to the limitation provisions of the Regulations and these are the only provisions with which we are concerned in this case. If it be true as the court says that they "apply only to actions at law and not to suits in equity" (Tr. p. 20) they are sufficient for this case which *is* an action at law.

It is of no purpose to speculate as to how far the Regulations may be supplanted by procedural rules for cases at law, which the Supreme Court may prescribe under its recent statutory authority (Tr. pp. 22-23).

No such rules have been issued, and if and when issued they will certainly not be retroactive as to bars by limitation even if they cover limitation of actions (which is doubtful) and even if they apply to the United States Court for China (which is also doubtful). The Statute says the rules are to be made "for the District Courts of the United States and for the Courts of the District of Columbia" (Act June 19, 1934; 48 Stat. 1064; U. S. Code Title 28, Sec. 723b).

The suggestion of Secretary of State Bayard, quoted in Hinckley, *op. cit.*, p. 55, footnote, and repeated by the court below (Tr. p. 21), that the consular regulation as to limitation of actions is to be regarded not as a "statutory mandate", but as a "rule of court", which "could be varied as justice might require", is contrary to the opinion of Attorney General Cushing and to the obvious purport of the Statute of 1860 which authorized and the Statute of 1906 which ratified the regulations.

It is true that an express proviso of Section 5 of the 1906 Act gives "the judge of the said United States court for China * * * authority from time to time to modify and supplement said rules of procedure" (Act June 30, 1906, 34 Stat. 814, Sec. 5; cf. U. S. Code Tit. 22, Sec. 196), but it would be contrary to the fundamental principles of our jurisprudence to conclude that this authorized the judge to make law to fit each case, according to his whim. With all due respect to the Trial Judge, we submit that no such autocratic power has been conferred on the judges of the United States Court for China. The extraordinary legislative power that they inherited from the

ministers must be held limited by the fundamental requirement of justice that laws shall be made known before they become binding, so that people may regulate their affairs accordingly. As Jeremy Bentham said,

> "We hear of tyrants, and those cruel ones: but, whatever we may have felt, we have never heard of any tyrant in such sort cruel, as to punish men for disobedience to laws or orders which he had kept them from the knowledge of."

5 Bentham, *Works* (1843), p. 547;

Griswold, *Government in Ignorance of The Law,* 48 Harv. Law Rev., 198 (1934).

Cf. *Panama Refining Co. v. Ryan,* 293 U. S. 388, 55 Sup. Ct. 241, 245, 254, 79 L. ed. (Adv. op.) 223, 227, 239 (1935).

If the Trial Judge feels that the administration of justice in his court will be improved by cutting down the period of limitation for actions on written contracts from six years to three, he might, perhaps, by an appropriate order, "modify * * * said rules of procedure" accordingly. But the order certainly must be a general one, publicly announced, and should allow a reasonable time for enforcing rights of action which have accrued previously and are not barred by the existing regulations.

Wheeler v. Jackson, 137 U. S. 245, 255, 34 L. ed. 659, 11 Sup. Ct. 76 (1890);

Lamb v. Powder River Live Stock Co., 132 Fed. 434 (C. C. A. 8th, 1904, per Van Devanter, J.)

No such order had been made by any judge of the United States Court for China prior to the decision of this case,

and Chapter XV, Section 83, of the Consular Court Regulations was therefore the law of the forum, which the Trial Judge was bound to follow as all of his predecessors had done. Thus Judge Thayer said in

> *Bennett v. Brooks,* 1 Extraterr. Cas. 220, 222 (1910),
>
> "The procedure of this court is regulated by the organic act, which provides that it shall be in accordance, so far as practicable, with the then existing procedure of American Consular Courts in China which is prescribed in the Court Regulations. * * * The same section of the creating act gives to the judge of the court authority to amend and supplement said rules *but the rules cited remain as they stood at the time when the act was passed.*"

The ruling of the court below in this case disregards a long line of decisions following the precedent established by Judge Thayer in the leading case of

> *U. S. v. Engelbracht,* 1 Extraterr. Cas. 169, 172 174 (1909).

This was a prosecution for embezzlement. The accused filed a plea to the effect that the action was barred by the lapse of the three-year period of limitation prescribed by R. S. Sec. 1044 (U. S. Code, Tit. 18, Sec. 582). The court overruled the plea, holding that the applicable period of limitation was that of six years prescribed by Section 82 of the Consular Court Regulations. Judge Thayer's opinion contains a sound and admirable analysis and discussion of the matter here in controversy. Only the length of the opinion and its ready accessibility in the reports of Extra-

territorial Cases deter us from reprinting the full text rather than selected passages in this brief.

Construing the organic act of 1906, Judge Thayer said in part:

> "Section 5 relates to the procedure of the court and provides that it shall be 'in accordance, so far as practicable, with the existing procedure prescribed for Consular Courts in China in accordance with the Revised Statutes of the United States,' the Judge being given power to modify and supplement the said rules. It is obvious that the particular Revised Statutes to which reference is made are those sections which we have already recited, contained in Title XLVII in pursuance of which the then existing procedure had been adopted. The words, 'in accordance with' are merely descriptive and not words of limitation.
>
> "In other words the procedure of the Court which this statute provides is found in the existing Consular Court Regulations. The statute does not state that only such regulations shall be binding as the Court may find to have been made in harmony with the Revised Statutes of the United States. It could have done so very easily by the use of appropriate words. As the statute stands it is not rationally open to any other construction than that announced. The phrase 'prescribed for Consular Courts in China in accordance with the Revised Statutes of the United States' is purely and simply descriptive.
>
> "All the existing Regulations had been laid before Congress, as required by law, many years before this statute was passed, and it must be presumed,

under well established doctrine,* that Congress had full knowledge thereof. In fact it appears to the Court that the provision referred to cannot be considered as anything less than an affirmative recognition and confirmation of such of these regulations, at least, as relate to procedure. Whether or not the act must be considered as recognizing and confirming the whole body of these regulations existing at the date of the passage of this act the Court does not at this time undertake to say. It is proper to note, however, that Congress had this opportunity to annul or modify any of these regulations but did not. Whatever objections may have been theretofore made to these regulations, based on a denial of the constitutional authority of Congress to delegate its legislative powers, it seems clear to the Court that the present action of Congress, in respect to such then existing regulations as relate to procedure of the Consular Courts, operates not only as a confirmation thereof but practically as an enactment of such regulations, exactly the same as if they had been verbally recited in the act itself. However much their origin may be assailed, the regulations adopted under Section 4117 are now clearly and unquestionably made binding and obligatory on this Court by direct and specific enactment. If Section 1044 of the Revised Statutes had theretofore any application in the Consular Courts of China, it has no force as a rule of procedure in the United States Court for China, because Congress has provided otherwise in the act creating the Court. Rule 82 of the Consular Court Regulations is made the law of this jurisdiction respecting the limitation of criminal prosecutions."

**Clinton v. Englebrecht,* 13 Wall. (U. S.) 434, 20 L. ed. 659.

Judge Thayer's holding was approved by Judge Lobingier.

> *Everett v. Swayne*, 1 Extraterr. Cas. 867, 868 (1919), aff'd on another point by this court, 255 Fed. 71;
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> *U. S. v. Furbush*, 2 Extraterr. Cas. 74, 86 (1921).
>
> Cf.
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> *Weil v. Wright*, 2 Extraterr. Cas. 395, 396 (1921);
>
> *Fischer v. Stone*, 2 Extraterr. Cas. 595, 605, 606 (1923).

The same conclusion was announced as recently as 1933 by Judge Purdy, the immediate predecessor of the present incumbent. We refer to

> *G. H. Sun & W. D. Mi v. The American Oriental Banking Corp.*, Cause No. 3520, Civil No. 1587, Decision and Judgment filed Oct. 5, 1933.

As the case has not yet been reported we have procured and filed with the clerk of this court a certified copy of Judge Purdy's Decision and Judgment. It will be observed that in that case as in this it was urged that an action upon a written contract was barred by the 3 year statute of the District of Columbia, but Judge Purdy held that the 6 year period of Sec. 83 of the Consular Court Regulations was controlling. We quote from the opinion (pages 10 and 11 of the certified copy on file with this court):

> "Of course Congress has the undoubted right to prescribe whatever limitations it may deem proper with respect to both civil and criminal actions cognizable in the United States Court for China, but it

seems to me that Congress never intended to provide limitations of action in the United States Court for China by such a roundabout and indirect manner as through the instrumentality of the Code of the District of Columbia.

"The Consular Court Regulations with respect to the limitation of actions were in force and operation in the American Consular Courts in China for more than thirty years prior to the establishment of the United States Court for China. Such Rules and Regulations were admittedly suitable and proper when framed and promulgated by Minister Burlingame in 1864. At that time there was no general law of the United States, nor is there one now prescribing periods of limitation for the prosecution of civil actions between private parties. It was therefore appropriate, if not absolutely necessary, that some such rule as the one in question be prescribed and included in the Consular Court Regulations which were published by the Minister. Again, these Rules and Regulations seem to me to have been in effect ratified and approved by Congress. They were published and promulgated by the Minister under authority conferred upon him by Sec. 4117 of the Revised Statutes, and they were required by Sec. 4119 of the Revised Statutes to be transmitted to the Secretary of State and by him laid before Congress for annulment or modification. (R. S.—Sec. 4118/19) And if we now turn to the provisions of the act of Congress establishing the United States Court for China we find the following:

> 'The procedure of the United States Court for China shall be in accordance, so far as practical, with the procedure prescribed for Consular

> Courts in China in accordance with Chapter 2 of this Title.'

That is to say, in accordance with Sec. 4117 of the Revised Statutes (22 U. S. C. A.—Sec. 146) which was the very provision of law under and pursuant to which Minister Burlingame in 1864 adopted and published the Consular Court Regulations for China.

"Taking all these matters into consideration I am satisfied that the limitation of six years contained in the Consular Court Regulations for China is the law of this jurisdiction with respect to the period within which a civil action on a contract may be prosecuted. I therefore hold that this action has not been barred by the Statute of Limitations as claimed by the defendant."

This Court itself has construed and applied this very section 83 of the Consular Court Regulations in a cause brought up from the United States Court for China, in 1926,

> *Wulfsohn v. Russo-Asiatic Bank,* 11 F. (2d) 715, 717 (C. C. A. 9th, No. 4343).

The action was for breach of certain exchange contracts and one of the questions raised on the appeal was whether the suit, which had been filed about three years after the breach, was barred by limitation. This court said that the defense of limitation had been waived by failure to plead it in the answer, but held, as a further ground for the decision, that the action was one upon written contracts and therefore within the six year rather than the two year provision of *"regulation 83 for the United States Consular Courts in China"*.

2. THERE IS NO AUTHORITY FOR THE TRIAL COURT'S APPLICATION OF THE THREE YEAR STATUTE OF THE DISTRICT OF COLUMBIA CODE. THE CASE OF BIDDLE v. UNITED STATES ON WHICH THE TRIAL COURT MAINLY RELIED IS NOT IN POINT.

As authority for its adoption of the District of Columbia statute of limitations the court below relies upon the decision of this court in

> *Biddle v. United States,* No. 1463, 156 Fed. 759, 762-763 (C. C. A. 9th, 1907), reversing 1 Extraterr. Cas. 84.

That case is not in point. The question there raised was not, as here, a question of procedure which Section 5 of the act of 1906 provides for by adopting the Consular Court Regulations. The case did not involve any question of procedure, and Section 5 was not even mentioned by the court. The decision dealt only with matters of substantive law, governed by Section 4 of the act of 1906 and the corresponding section of the act of 1860, which direct the United States Court for China to apply "the laws of the United States" and in cases where those laws are inappropriate or deficient, the common law, including equity and admiralty, and "the law as established by the decisions of the courts of the United States".

> Act June 30, 1906, 34 Stat. 814, U. S. Code Tit. 22, Sec. 195; Act June 22, 1860, 12 Stat. 72, R. S. Sec. 4086, U. S. Code Tit. 22, Sec. 145.

In the *Biddle* case the appellant was contending that his conviction for obtaining money under false pretenses was not justified because that method of doing business

was no crime at common law and was not made such by any "law of the United States". The China Court had held that the British Statute of 1757 which first made it a crime to obtain money by false pretenses had been adopted as part of the common law of this country, and that it was therefore applicable to American citizens in China as, in the China Court's view, the laws of the United States did not cover the subject.

This court agreed that the obtaining of money under false pretenses could properly be regarded as a crime by the common law, but said that it was not necessary to rest the decision on that ground alone, for such an act is also a crime under the laws of the United States. The court held that "laws of the United States", within the meaning of Section 4 of the statute, included not only general statutes applicable throughout the country, but also legislation enacted especially for some particular territory "over which the United States exercise exclusive legislative jurisdiction". Referring then to the Alaska Criminal Code of 1899 and the District of Columbia Code of 1901, the court found that these both made obtaining money under false pretenses a crime against the United States. Such also was the effect of the act of July 7, 1898, 30 Stat. 717, Sec. 2, under which any act committed in federal military reservations or the like, within a state, if criminal by the law of the state, is also a crime against the United States. For obtaining money under false pretenses is a crime by the laws of nearly every state of the Union. The court summed the matter up thus:

> "In view of the legislation of Congress to which we have referred (the acts relating to Alaska and

> the District of Columbia, and the statute of July 7, 1898), our conclusion is that obtaining money or goods under false pretenses is an offense against the laws of the United States, within the meaning of the statute conferring jurisdiction upon the United States Court for China, and that an American citizen guilty of the commission of such an act in China is subject to trial and punishment therefor by that court." (156 Fed. 759, 763.)

The judgment of conviction in the *Biddle* case was reversed; because, however, facts sufficient to constitute the crime charged had neither been alleged nor proved.

It is not necessary, and we will not attempt, to state the exact extent and limits of the rule of the *Biddle* case, under which certain statutes enacted by Congress for limited areas under its exclusive jurisdiction such as Alaska and the District of Columbia may be applied by the United States Court for China. It seems enough to say that this court cannot have intended by its decision in the *Biddle* case to authorize the China Court to apply Alaska or District of Columbia statutes except in cases otherwise unprovided for by legislation. A general law of the United States would certainly take precedence over such a statute, as held by Judge Lobingier in

Ezra v. Merriman, 1 Extraterr. Cas. 809 (1918).

A fortiori, if a matter is covered by legislation enacted *expressly* for the United States jurisdiction in China, there is no occasion for looking to the District of Columbia or Alaska laws for provisions that may be conflicting. Such is the situation in this case. For as we have shown, the matter of procedure in the China Court, including

limitation of actions, is specifically provided for in Section 5 of the organic act by the ratification and adoption of the existing Consular Court Regulations.

Section 4, under which the *Biddle* case was decided, cannot be construed to authorize the nullification of section 5. When the two sections are considered together it is obvious that so far as the matter of procedure is covered by Section 5 and the Regulations referred to therein, it is outside the scope of Section 4 and therefore unaffected by other laws of the United States whether general or special. We believe it must be said here as in *U. S. v. Engelbracht,* 1 Extraterr. Cas. 169 (1909), that *"There is nothing in section 4 of the act which touches directly the question here presented. Section 5 relates to the procedure of the Court.* * * *"

Another illustrative case is

> *U. S. v. Furbush,* 2 Extraterr. Cas. 74, 84-86, (1921).

In this prosecution for murder it was contended that the accused was entitled to a jury trial under the laws of Alaska and the District of Columbia, which, counsel said, had been "extended to American citizens residing in * * * China" by the decision of this court in the *Biddle* case. Judge Lobingier pointed out that

> "Of course the 'Biddle Case' extended nothing. Laws are not extended by judicial decision. * * * All that the Court of Appeals did in 'the Biddle Case' was to recognize and apply the legislative extension effected nearly sixty years before. It, indeed, impliedly treated certain acts of Congress, tho passed

for the District of Columbia and Alaska, as 'laws of the United States;' but that was merely the natural interpretation of the phraseology used in the extending act. * * *

"There are, of course, certain 'laws of the United States' which provide for jury trials; but they have never been extended to China. In their place Congress enacted other laws governing procedure in extraterritorial countries and the jury feature was invariably omitted. 'Any consul when sitting alone' was given criminal jurisdiction of ordinary cases tho provision was also made for 'associates' and upon the Minister jurisdiction of capital offenses was conferred. This was the legislation which the famous 'Ross case'* construed and upheld, and it was this jurisdiction 'exercised by United States Consuls and Ministers' which was transferred to this court upon its organization.

"*The rules governing trials, however, are a branch of procedure* and the organic act of this court further provided

" 'That the procedure of said court shall be in accordance, so far as practicable, with the existing procedure prescribed for Consular courts in China in accordance with the Revised Statutes of the United States.'

"In other words the very provisions construed in the Ross Case were, by this section, continued in

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**Ross v. McIntyre*, 140 U. S. 453, 35 L. ed. 581 (1891), in which the Supreme Court held that a trial and conviction for murder in a consular court, duly held and conducted "in accordance with court regulations" was not subject to collateral attack for violation of the constitutional guarantees as to indictment and jury trial, because these "apply only to citizens and others within the United States * * * and not to residents or temporary sojourners abroad."

> force as to this court and it is idle to argue that the Ross case is not in point because the court had not then been established. Moreover, the legislation above referred to gave the Minister power, which he exercised, to frame additional *regulations governing procedure,* and these, which exclude the jury, *are* likewise *continued in force by the organic act.*"

What the court below failed to appreciate is that the question of limitation, as a matter of procedure, is governed solely by section 5 of the organic act and by the Consular Court Regulations thereby adopted and "continued in force". Such matters are not within the province of Section 4 so as to justify the application of Alaska or District of Columbia statutes under the decision of this court in the *Biddle* case, which was based on a construction of Section 4.

Section 5 and the Regulations cover the case specifically and completely, and leave no gap to be filled by District of Columbia statutes under the rule of the *Biddle* case and its construction of Section 4. But wholly apart from Section 5, and assuming, for purposes of argument and contrary to fact, that there is no Section 5 in the statute, and the matter is to be governed by Section 4, i. e., by "the laws of the United States", as that term is construed in the *Biddle* case, we can see no possible reason for applying the 3-year statute of the District of Columbia Code* in preference to the Alaska statutes,** also mentioned in the *Biddle* case, and which allow *6 years*

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*Act Mar. 3, 1901, 31 Stat. 1189, 1389, c. 854, Sec. 1265; Code of 1930, p. 339, Tit. 24, c. 12, Sec. 341.

**Act June 6, 1900, 31 Stat. 321, 334, c. 786, Tit. 2, Sec. 6; Comp. Laws of Alaska, 1913, p. 381, Sec. 838.

for the commencement of such an action. We submit that neither the Act of 1906 nor the decision of this court in the *Biddle* case suggests the slightest reason for applying the District of Columbia law rather than the Alaska law in this case.

The organic act makes no reference to either. Section 4 simply refers to "laws of the United States now in force in reference to the American Consular Courts in China". That takes us back to the Act of June 22, 1860, Section 4 of which directs that the "laws of the United States" be applied, while Section 5 provides that the procedure shall be in accordance with the Minister's regulations. This court, in the *Biddle* case, held that "laws of the United States", within the meaning of Section 4 of the 1860 act might include the criminal laws enacted by Congress for Alaska and for the District of Columbia as well as the criminal laws of any state adopted by the Statute of July 7, 1898, with regard to crimes committed on federal military reservations, etc., within the states. In the *Biddle* case it was not necessary to make any choice among the available statutes, for they were substantially the same as to the matter there in controversy, and the court did not indicate any basis for choice among them.

No more does the court below indicate why it selected the District of Columbia statute, which would bar the plaintiff's action, rather than the Alaska statute or one of the great majority of state statutes that would not. In point of law there was no reason. The Trial Judge's decision to apply the shorter statute can only be regarded as arbitrary, for there is not an iota of legal principle or reasoning to tip the scales toward that side. Our juris-

prudence does not sanction such fortuitous judicial action; it requires that every decision be based on principle and legal reasoning sufficient to sustain it.

See

Cardozo, *The Nature of the Judicial Process* (1925), pp. 138-141.

There is of course no need in this case to attempt a solution of the dilemma in which the court below became entangled. The whole difficulty was occasioned by the court's failure to regard the provisions of Section 5 of the organic act. That section supplies the premises that make the conclusion as plain as A, B, C. It says clearly that matters of procedure shall be governed by the Consular Court Regulations, and Section 83 of those regulations says that the period of limitation for actions on written contracts shall be six years. This *is* an action on a written contract. Therefore the plaintiff had six years within which to bring his suit. His cause of action accrued, we submit, on April 30, 1930—certainly not earlier than April 1, 1928, and his action was filed Feb. 1, 1934, less than six years thereafter. Therefore the action was not barred by limitation and the court's judgment of dismissal was erroneous.

B. THE COURT BELOW ERRED IN NOT GRANTING THE PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS.

1. THE ALLEGATIONS OF THE COMPLAINT AND THE ADMISSIONS OF THE ANSWER ESTABLISH A COMPLETE CAUSE OF ACTION FOR BREACH OF CONTRACT AND FIX THE AMOUNT OF THE DAMAGES.

It stands alleged and admitted that the defendant agreed in writing that if plaintiff did not return to China at the conclusion of his vacation, January 1, 1928, defendant would pay plaintiff 50,000 taels, to accrue as profits were made by defendant after that time, 6/10ths of such profits to be paid to plaintiff until the total sum of 50,000 taels had been paid, after which the entire business should be defendant's. That the partnership relation should nevertheless terminate January 1, 1928, in the event plaintiff did not return, is clearly indicated by the provision that although plaintiff's "interest in the profits" should continue until he was paid in full, his liability should cease "at that time", i. e., January 1, 1928.

Concededly plaintiff did not return to China. Defendant paid under the contract only 2,225.88 taels, representing 6/10ths of his profits from January 1, 1928, to March 31, 1928, inclusive. The balance, 47,774.12 taels, remains unpaid, although defendant admits that 6/10ths of his profits from April 1, 1928, to April 30, 1930, amounted to more than that sum. Clearly, therefore, if plaintiff has a cause of action, his damages are fixed in the amount of 47,774.12 taels, with interest thereon (as claimed) from April 30, 1930.

We submit that these admitted facts disclose a valid contract and a cause of action for its breach.

The four defenses set up by the answer—performance, lack of consideration, failure of consideration and limitation—are all demonstrably bad on the face of the pleadings.

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2. NO VALID DEFENSE ON THE MERITS IS SET UP IN THE ANSWER.

a. The plea of performance depends upon allegations excluded by the parol evidence rule.

The allegations of paragraph 3 of the answer amount to a plea of performance. After having admitted, in paragraph 1 of the answer, the execution of the written agreement set out in full in the complaint, the defendant proceeds, in paragraph 3 of the answer, to restate the agreement in different terms, so as to make the continuance of payment conditional upon continued use of the firm name of Chalaire & Franklin. It is then pleaded that payment was continued until March 31, 1928, "when the defendant ceased the practice of law under the firm name and style of Chalaire & Franklin and abandoned the goodwill attaching" thereto.

The written agreement pleaded in the complaint and admitted in paragraph 1 of the answer says nothing about the use of the firm name, and the absence of provision to the contrary leaves the implication that no right was given to the defendant Franklin to use the plaintiff's name at all after the termination of the partnership relation on January 1, 1928.

> "In the absence of agreement providing therefor, the partners remaining after one of them has retired are not entitled to the continued use of the old name. Nor do the continuing partners secure that right by virtue of the conveyance to them by the retiring partner of all his right, title, and interest in the partnership business, property or assets, or even the good will where it rests upon the personal attributes of the partners."
>
> 47 *C. J.* 1022.

The provision that plaintiff's liability should cease January 1, 1928, is likewise inconsistent with any implication that the defendant might use plaintiff's name after that time. In

Morgan v. Schuyler, 79 N. Y. 490, 494 (1880),

the court said:

> "* * * no case holds that the good will included the right to a continued use of the name of the firm. Indeed in such a case, the retiring partner would have given up the advantages, but remained liable to the risks and burdens of business, for *if his name continued upon the signs or other advertisements of the firm he would be bound to every one who gave credit thereto, in ignorance of the real state of the case, and liable for all debts contracted in the firm name.*"

This decision was followed in

Blumenthal v. Strauss, 6 N. Y. S. 393, 394 (1889),

in which the court said:

> "* * * It will have been observed that nothing in the transfer in its whole scope grants in any form

the right of using the plaintiff's name, or the right to declare themselves the successors of the old firm. * * * There is nothing in the facts and circumstances, duly and closely considered, which justifies the conclusion that by the agreement of dissolution the plaintiff designed to grant, or that the defendants expected to acquire by it, the right to assert that they were the successors to the business of the old firm, or of the members of the old firm; and *in the absence of* such *an agreement,* express or implied, *there is no right so to employ the name of one of the partners on dissolution,* or so to assert in reference to the whole business, since the decision of the court of appeals in *Morgan v. Schuyler,* 79 N. Y. 490, a decision which has not been questioned."

If the contract granted no right to the defendant to use plaintiff's name at all, then the contention that payment was conditioned on continued use of that name must fall. Indeed, all the allegations of paragraph 3 of the answer purporting to state the agreement between the parties in terms varying from those of the written contract admitted in paragraph 1, are rendered nugatory by the parol evidence rule.

"* * * The principle is, that while parol evidence is sometimes admissible to explain such terms in the contract as are doubtful, it is not admissible to contradict what is plain, or to add new terms."

DeWitt v. Berry, 134 U. S. 306, 312, 33 L. ed. 896, 899, 10 Sup. Ct. 536 (1899)

Strictly speaking, it is not a rule of evidence at all, or even one of interpretation.

"It is a rule of substantive law which, when applicable, defines the limits of a contract."

II *Williston on Contracts,* Sec. 631, p. 1221;

V *Wigmore on Evidence* (2d Ed.), Sec. 2400, p. 236.

"* * * The writing is the contractual act, of which that which is extrinsic, whether resting in parol or in other writings, forms no part."

Pitcairn v. Philip Hiss Co., 125 Fed. 110, 113, (C. C. A. 3d, 1903).

It follows as a corollary that in rendering judgment upon the pleadings a court will disregard allegations that attempt to vary the terms of a written instrument the exact words of which have been pleaded and admitted. Thus in

United States v. Ames, 99 U. S. 35, 45, 25 L. ed. 295 (1879),

the Supreme Court said:

"Facts well pleaded are admitted by a demurrer; but it does not admit matters of inference or argument, nor does it admit the alleged construction of an instrument when the instrument itself is set forth in the record, in cases where the construction assumed is repugnant to its language. Authorities to that effect are numerous and decisive; nor can it be admitted that a demurrer can be held to work an admission that parol evidence is admissible to enlarge or contradict a sealed instrument which has become a matter of record in a judicial proceeding."

We are thus referred back to the terms of the agreement itself, as pleaded in the complaint and admitted in paragraph 1 of the answer. These disclose no basis for the contention that defendant's liability to pay ceased when he stopped using the name of Chalaire & Franklin. Therefore the plea of performance is bad.

b. The plea of no consideration is a conclusion of law unsupported by any allegations of fact and contrary to the facts pleaded and admitted.

This plea, as stated in the "First Separate and Distinct Defense" (Tr. pp. 16-17) is of course the barest conclusion of law. It therefore must stand or fall on the facts elsewhere pleaded and admitted and these show, we submit, an adequate consideration bargained for and received by the defendant.

The contract is in form unilateral.

See

I *Williston on Contracts* (1920), Sec. 102, p. 195.

The plaintiff did not, originally, promise anything. The defendant promised that *if* the plaintiff would not come back to China, he (the defendant) would pay the plaintiff 50,000 taels in the manner provided, after which the business should be his. There is of course no necessity that both parties to a contract should be bound by mutual promises from the outset. As Chief Justice Marshall said in

Violett v. Patton, 5 Cranch, 142, 150, 3 L. ed. 61 (1809),

"To constitute a consideration * * * it is sufficient that something valuable flows from the person to

whom" the promise "is made; and that the promise is the inducement to the transaction."

The commonest sort of contract is that consisting of a promise given in exchange for an act,

> *Anson on Contracts,* 2d Am. Ed., 1887, Part II, c. II, Sec. 4(a), p. 117,

and to refrain from doing what one has a legal right to do is just as good consideration as to do what one has a right to refrain from doing.

> *Hamer v. Sidway,* 124 N. Y. 538, 27 N. E. 256 (1891);
>
> I *Williston on Contracts* (1920), Sec. 102a, p. 198;
>
> Contracts Restatement, Am. Law Inst., 1932, Sec. 75.

When one promises another in writing to pay for some act or forbearance to act which is to the promisor's benefit and the act is done or forborne by the promisee as stipulated, it is to be presumed that the promise was seriously made and that it was the inducement for the other party's performance.

> *Williston,* op. cit., Sec. 102, p. 197.

Such, very evidently, was the defendant's understanding of the situation in this case, for when the plaintiff notified the defendant that he was not going to return to China, and did not return by January 1, 1928, the defendant commenced payment to plaintiff in the manner specified in the contract. It may be conceded that when the agreement was signed there was no consideration for the de-

fendant's undertaking, for the plaintiff retained the election whether or not to perform. The defendant's undertaking to pay 50,000 taels to plaintiff if he would not return was originally a mere offer, which might have been withdrawn perhaps even in November, 1927, when plaintiff notified defendant that he would not return to China. But when defendant, after receiving that notice, allowed the offer to stand, plaintiff's forbearance to return was an acceptance of the offer which caused it to become a binding contract on January 1, 1928. The plaintiff "did not return". That was the consideration for which the defendant had bargained and he received it.

The nature of the benefit to defendant is obvious—it gave him the opportunity to hold for himself the profitable legal business of which previously the plaintiff had had the larger share, and the record shows that the business did prove very lucrative to the defendant. The plaintiff's decision not to return to China, on the other hand, must be presumed to have been induced by his reliance upon the defendant's promise to pay a sum regarded by the parties as fair compensation to plaintiff for giving up to his partner the senior's share in their profitable practice. The essential consideration to defendant of course was that the plaintiff should not *practice law* in China, but that is included in the more comprehensive term "not return to China", and plaintiff in fact rendered not only substantial but literal performance.

We therefore submit that the plea of no consideration is bad.

c. The plea of failure of consideration, like that of performance, depends upon allegations excluded by the parol evidence rule.

This plea rests upon the allegations (Tr. p. 17) that if there was any consideration for the defendant's promise to pay "an important part of such consideration was plaintiff's promise to secure in the United States, lucrative legal business and send the same to the defendant in China", that plaintiff had not done so and thus a failure of consideration had resulted.

There is no such provision in the written contract. Clearly, therefore, this plea is barred by the parol evidence rule, under the authorities already cited in connection with the plea of performance, supra, pp. 36 to 37. A clearer case for the application of that rule could hardly be imagined. We therefore submit that the plea of failure of consideration is bad.

Only one other defense is pleaded in the answer.

d. The plea of the statute of limitations is bad because the record shows that this action was brought within the period of six years allowed by the Consular Court Regulations.

This has already been covered in the first part of the argument, dealing with the judgment of dismissal which in effect sustained this plea. We have shown that the applicable statute of limitations was Section 83 of the Consular Court Regulations which allows an action such as this upon a written contract, to be brought at any time within six years from the date when the cause of action accrued. The record shows that the plaintiff's cause of action accrued, we submit, April 30, 1930, and

by no possible theory earlier than April 1, 1928 (Tr. pp. 14, 16), that the action was originally filed February 1, 1934 (Tr. p. 2), less than six years thereafter, and the amended complaint (Tr. p. 12) states no new cause of action.

Therefore we submit that the plea of limitation is bad, that no issue has been raised by the answer and that the plaintiff's motion for judgment on the pleadings should have been granted.

V.

Conclusion.

The judgment of the court below dismissing the plaintiff's complaint and awarding costs to the defendant should be reversed. The cause should be remanded with directions to enter judgment for plaintiff in the amount prayed for in the complaint, with interest thereon as prayed and with costs in both courts.

Respectfully submitted,

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3

United States Circuit Court of Appeals

Ninth Circuit

Appeal from

United States Court for China

Walter Chalaire,

Appellant

v

No. 7753

Cornell S. Franklin,

Appellee

BRIEF FOR APPELLEE

Herewith, and following under same cover is Reprint of Motion to Affirm Judgment which was filed December 14, 1935, and has Points and Authorities also reprinted

Attorneys for Appellee: Frank E. Hinckley and W. H. Lawrence, both of San Francisco, California
Of Counsel: Franklin & Harrington, Shanghai, China

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United States Circuit Court of Appeals
Ninth Circuit

Appeal from
United States Court for China

WALTER CHALAIRE,
Appellant

v

No. 7753

CORNELL S. FRANKLIN,
Appellee

BRIEF FOR APPELLEE

Assuming, and not conceding, appellant has presented a case reviewable on appeal, this brief for appellee respectfully maintains:

Point One: The Congress has provided limitation of actions on written contract in the United States Court for China in terms of similar provision for the District of Columbia.

Point Two: In addition to good defense on limitation of actions the answer well pleaded other good defenses, to wit: lawful termination of agreement incomplete from its inception; no consideration; and failure of consideration; and with any one defense good, the judgment stands.

POINT ONE: THE CONGRESS HAS PROVIDED LIMITATION OF ACTIONS ON WRITTEN CONTRACT IN THE UNITED STATES COURT FOR CHINA IN TERMS OF SIMILAR PROVISION FOR THE DISTRICT OF COLUMBIA.

(a) **Biddle v United States**

With *Biddle v United States* (CCA 9, 1907) 156 F 759 began a gradually more assured and highly useful line of decisions in the United States Court for China. "The laws of the United States" to be there applied, and the qualifications of "suitable", "practicable", "applicable", which the court is empowered to determine, were, until *Biddle v United States,* most difficult to determine. Because that determination, especially with increased commerce with China, was too difficult for the consular officers sitting occasionally and quite informally, whose judicial authority was but a peculiar incident of their executive functions, President Theodore Roosevelt proposed that in place of numerous consular courts there be established one central court taking over all but justice of peace jurisdiction of consuls and with powers both federal and territorial, organized and having procedure adapted from that of United States District Courts. Such was the exigency over irregular consular administration of estates and inefficient consular jurisdiction of crimes (beach combers and bawdy-houses infesting otherwise exceptionally high class American commercial communities)

that extreme pressure developed in Congress itself demanding instant legislation. The legislation, as its date shows, June 30, 1906,* the last day of the session, was the same day signed by the President and appropriation was hurried through. This haste is evident from the very text of the Act, including, as it does, both administrative directions to consuls as to estates and judicial authorizations of rather mixed nature. In the first months the Court, although the able Attorney General for the Philippine Islands had been appointed Judge, experienced strong defiance of law-breaking elements and very serious embarrassment caused by want of specifically applicable law, so far as could be discovered. The laws of the United States and the common law were searched for law applicable to vagrancy, for example, in the still functioning consular courts, for law as to obtaining money on false pretenses, for law as to domicil, for law as to probate. In contrast, the British Supreme Court for China, also sitting mostly at Shanghai, established as early as 1866 and since then functioning, had simply to apply, not the laws of the British Empire or anything like federal-territorial-state law, but simply the law of England. This was in 1906. In 1907 this Circuit Court of Appeals decided *Biddle v United States*. The jurisprudence of that great opinion was a breaking of dawn, a light from the east for United States jurisdiction in China. The opinion was by De Haven, CJ, with whom were Gilbert and Ross, CJJ. Years afterward, conversation with Circuit Judge Gilbert about law practice in China occasioned his remarking

*Act Jun 30, 1906, 34 Stat 814; 22 USCA 191-202

that it had been expected later appeals would bring further definition of the rule. But *Biddle v United States,* fundamental and practical, everywhere met with the highest approbation, especially of the bench and bar in China. The present appeal of Chalaire v Franklin, we regret to observe, is the only appeal in 39 years since *Biddle v United States* that has questioned its application. No federal court has questioned it. Only once has it been cited, and there for an example, in the United States Supreme Court. In the United States Court for China it has been applied many hundreds of times. It is as beneficial to our fellow citizens residing and doing business in China as a principle of the Constitution is in their homeland. Yet in Chalaire v Franklin a practical application of *Biddle v United States* by a long experienced trial court is challenged as error and even described as arbitrary!

This singular contention, utterly isolated, rests upon objection that *Biddle v United States* was a criminal case, while Chalaire v Franklin is civil. The same reasoning put upon the greatest of constitutional law adjudications of the United States Supreme Court would minimize their benefits beyond recognition. Was not *In re Ross* in the Supreme Court also criminal? (1891) 140 US 453; 38 L ed 581. Appellant would reason that great authorities in international law like John Bassett Moore or in constitutional law like Frederic Coudert have been constantly mistaken as to *In re Ross!* *Moore, International Law Digest,* at sundry pages in volumes 1, 2, 3 and 5. *DeLima v Bidwell* (1901) 182 US 1; 45 L ed 1041.

Turning to the law reports of the United States Court for China known as Extraterritorial Cases, an examination of cases decided between the years 1907, *Biddle v. United States,* and 1926 (The same is true later.) almost every case is found to rest upon *Biddle v United States.*

At this point reference is requested to the Points and Authorities for the Motion to Affirm Judgment, pages 12-14, (A reprint follows.) where the appeals from the United States Court for China are listed.

(b) Consular Court Regulations were not statutes

In *Moore, International Law Digest,* vol. 2 at p. 617 folwg, the following views are expressed:

Attorney General Cushing, who had negotiated the original treaty with China: The power to make 'decrees and regulations' enabled the minister in certain respects to *legislate,* and served 'to provide for many cases of criminality, which neither Federal statutes nor the common law would cover'. Sep 19, 1855; 7 Op 495, 504.

Secretary of State Seward, having newly received a copy of the regulation prohibiting navigation by American vessels of the Straw Shoe Channel in the Yangtsze River: 'It is certainly judicious to avoid . . . the assertion of power in the minister to make that unlawful which was not forbidden by the laws of the United States or of China. Such a power is legis-

lative, while the act cited purports by its title and the general tenor of its provisions to confer only judicial power.' Feb 6, 1869; MS Inst. China, II. 46.

Secretary of State Fish, as to regulations, Japan, thought certain of them transcended the authority delegated to the Minister, an authority not extending to creation of new rights and duties. Dec. 20, 1870; MS Inst. Japan, I. 373.

Secretary of State Bayard, particularly as to limitations of actions in the regulations, China, said: 'I do not, it is true, regard this rule as a statute. Not only had Mr. Burlingame no power to enact a statute, as such, but the language of the rule shows that it cannot be regarded as a statutory enactment. . . . I hold, therefore, that Rule XV. of the Regulations of 1864, while not to be regarded as having the fixedness of a statute, is to be viewed as a rule of court expressing a principle open to modification by the court that issued it. It stands in the same position as do equity rules, . . . not as a statutory mandate, . . . but as a principle and regulation of practice which it is open to the court to expend or vary as the purposes of justice may require, above mentioned.

(Rule XV is the so called Statute of Limitations of the Consular Court Regulations, China, 1864)

Secretary of State Olney, referring to a regulation for rendition of an accused person from one consular district to another, China, 1897, observed: 'The power of the minister to make such decrees and regulations is limited to furnishing 'sufficient and appropriate remedies.', Feb 2, 1897; MS. Inst. China, V, 415.

These Secretaries of State were eminent lawyers and the matters before them for action required decisions, not generalities such as Mr Cushing had ventured. We are obligated to remonstrate against remarks in Brief for Appellant, pages 16 to 18; the trial court was well associated in holding the regulation not a statute.

(c) **Obsolescence and eventual non-use of Regulations**

Who may have been the draftsman of the mostly identical Consular Court Regulations, Turkey, 1862, and China, 1864, fully identical on limitations of actions, must probably remain obscure. What use there was in them has almost wholly passed. To comply with them at this time in their totality would set back the protection of citizens and the obligation to perform treaty to 1864 or more than 70 years.

After the war of 1914-18, housing conditions in Washington, D. C., continuing to be supervised by a Rent Commission, although the emergency had passed, a bill to enjoin enforcement of an order of the Rent Commission, the matter came eventually to the United States Supreme Court; Mr Justice Holmes delivered the opinion, and with the observation that "If about all that remains of war conditions is the increased cost of living, that is not, in itself, a justification of the act. Without going beyond the limits of judicial knowledge, we can say at least that the

plaintiff's allegations cannot be declared offhand to be unmaintainable, and that it is not impossible that a full development of the facts will show them to be true. In that case the operation of the statute would be at an end." "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed."

Chastleton Corp v Sinclair (1924) 264 US 543, 547, 548; 68 L ed 841, 843

Repeal of statute by implication is not favored; but here it is not a statute that may have been repealed; it is merely a rule of court superseded by statute. The object of establishing the United States Court for China in 1906 was to improve our jurisdiction in China outright and thoroughly. The Act of 1906 itself in part goes into detail of procedure, and in other part authorizes the judge to modify and supplement the rules of procedure. It is the laws of the United States that are to be applied; the formalities of procedure are subordinate to the laws.

(d) In this treaty-legislative court the judge has special power to apply laws of the United States

But the jurisdiction "shall in all cases be exercised in conformity with said treaties and the laws of the United States now in force". The Statute of Limitations enacted for the District of Columbia was in 1906 a law of the United States to which the jurisdiction should conform. The Statute for Alaska was not such a law of the United States from the time "exclusive legislative jurisdiction" of Congress for Alaska closed, that is from August 24, 1912. Act of Congress Aug 24, 1912, 37 Stat 512, c 387, sec 1 and 3; 48 USCA 21, 23; Alaska Organic Act

That the United States Court for China is an arm of the executive branch of government in performance of its authority and obligation to conduct foreign relations, particularly of the jurisdictional phases of the treaties with China, will be granted. Its character as a legislative, rather than a constitutional court, is mentioned in connection with citation of *Biddle v United States* in the opinion written by Mr Justice Van Devanter in

> *Ex parte Bakelite Corporation* (1929) 279 US 438, 450; 73 L ed 789, 793

where it is said:

"A like view has been taken of the status and jurisdiction of the courts provided by Congress for the District of Columbia. These courts, this court has held, are created in virtue of the power of Congress 'to exercise exclusive legislation' over the district made the seat of government of the United States, are legis-

lative rather than constitutional courts, and may be clothed with the authority and charged with the duty of giving advisory decisions in proceedings which are not cases or controversies within the meaning of article 3 (of the Constitution), but are merely in aid of legislative or executive action, and therefore outside the admissible jurisdiction of courts established under that article.

"The United States court for China and the consular courts are legislative courts created as a means of carrying into effect powers conferred by the Constitution respecting treaties and commerce with foreign countries. They exercise their functions within particular districts in foreign territory and are invested with a large measure of jurisdiction over American citizens in those districts. The authority of Congress to create them and to clothe them with such jurisdiction has been upheld by this court and is well recognized."

The power to apply laws of the United States "suitable", "practicable", "applicable" has gradually been better interpreted in the United States Court for China. A page by page examination of Extraterritorial Cases, covering the years 1906 to 1923, and of law office notes of subsequent cases, shows the progress of judicial upbuilding of the jurisdiction on foundation of *Biddle v United States*. In 1907, just before *Biddle v United States,* the first Judge of the Court, Judge Wilfley, having decided *United States v Biddle* (1907) 1 Ext Cas 120, holding obtaining money on false pretenses was an offense at common law (in this respect approved on appeal), observed in

In re Allen's Will (1907) 1 Ext Cas 92, 98
"To such an extent has the British jurisdiction in China been developed that there is almost no legislative or judicial phase of the law in force in England which, if necessary in China, has not its counterpart here. On the other hand "common law" and "equity" form the vague and indefinite description of the main law in force in respect to Americans in China." Yet in this very opinion and decision, holding domicil in China could be acquired by an American citizen, the reasoning and the demonstrating of practical necessity of so holding in order that this treaty-legislative jurisdiction should be effective in probate convinced the British courts both in China and in Turkey, changing the course of their decisions. On appeal the House of Lords approved.

Casdagli v Casdagli A C (1919) 145, 168

However, with hundreds of applications of *Biddle v United States* in the intervening years, including both civil and criminal matters, with some efforts to conform to *Biddle v United States* even to extent of dicta saying that laws common to the States were also "laws of the United States", and with some effort to apply a "more suitable" or "later" law, an extreme decision, now seen to be erroneous, and having general tacit disapproval from the beginning, was made in

United States ex rel Raven v McRea, Acting Clerk of Court (1917) 1 Ext Cas 655

Notwithstanding Congress had divested itself of exclusive legislative jurisdiction in Alaska from August 24, 1912, the United States Court for China held that

through the Act of Congress for Alaska, March 2, 1903, a "suitable" incorporating act had been provided. Incorporation, done in Alaska through executive officers, was to be accomplished in China "thru the machinery" of the United States Court for China! Citing *Biddle v United States,* Judge Lobingier said: "This is the doctrine now regularly applied by this court which has declared that:

> "extension results quite independently of the original purpose of the acts themselves. Thus Congress may enact a law for a limited area under its exclusive jurisdiction, such as Alaska or the District of Columbia; by its terms it may have no force outside of such area; but if it is 'necessary to execute such treaties' (with China) and 'suitable to carry the same into effect', it becomes operative here by virtue of the act of 1860 above quoted. Such we understand to be the doctrine announced by the Court of Appeals."
>
> *United States v Allen* (1914) 1 Ext Cas 326, 329;
>
> *In re Thacher's Will* (1916) 1 Ext Cas 524, 525

This reasoning we must regard as fallacious in respect to Alaska.

General Acts of Congress like the Code of Alaska when, by reason of setting up a territorial legislature Congress no longer has exclusive legislative jurisdiction in such territory, with result that such general Acts, to extent permitted in the organic act, may be modified by the territorial legislature, are no longer laws of the United States. If they were, the Court

would be obliged, by parity of reasoning, to apply in China any general Act of Congress for any former territory, prior to its being set up independently to legislate for itself. Thus the laws of the United States for the several western territories would become applicable in China.*

But the District of Columbia, as remaining under exclusive legislative jurisdiction of Congress, has, in the later decisions, but not without some aberrations, been applied. This is common knowledge among American citizens in China. It is also common knowledge that the Consular Court Regulations of 1864 have but a vestige of applicability. Every American citizen in China has for years known that the District of Columbia Code is commonly resorted to for laws applicable in the United States Court for China.

Apparently the theory of appellants and the theory of the Engelbracht case is that these Consular Court Regulations are not only special statutes but even

*"We were at first in doubt as to whether the initial words of the statute (35 Stat 711, c 250; Act of Mar 3, 1909, Vagrancy: defined; penalty, District of Columbia; now D. C. Code, Title 6, Section 291,—last paragraph); and compare (Rev Stat Sec 4101; 22 USCA 155,—Consular Courts, punishment of crime by fine or imprisonment, or both, 'at the discretion of the officer who decides the case' and 'according to the magnitude and aggravation of the offense') did not localize the offense and make the act inapplicable elsewhere than in the District of Columbia. But a re-examination of the statutes treated as applicable by the Court of Appeals (Biddle v United States) in announcing its doctrine that any pertinent act of Congress is in force here regardless of the limits within which it was originally intended to apply, convinces us that they are in principle no different from the statute here invoked. Moreover the Court of Appeals there applied acts which had been passed long subsequent to the Congressional extension of the 'laws of the United States . . . over all citizens' in China." Lobingier, J, in

United States v Osman (1916) 1 Ext Cas 540, 544

approving opinion of Thayer, J, in

United States v Grimsinger (1912) 1 Ext Cas 282, 285

NOTE: *Biddle v United States* (CCA 9, 1907), above mentioned, is reported at 156 F 759.

super-special,—statutes of a sort hitherto unknown, never repealable except by specific repeal. Only so could they be got rid of. That is, says appellant, the Minister to China, empowered by Congress, has legislated (and Attorney General Cushing, speaking in vacuo, says the Minister is empowered to legislate); and once this legislation from China is promulgated, even Congress is impotent to change it unless by specifically citing it and therewith denouncing it by chapter and section. Medes and Persians!! But, of course, there is some evidence internal to the Consular Court Regulations that they could not have attained a super-statutory dignity. If our friends who represent appellant continue to maintain the Consular Courts were thus panoplied with armor impenetrable by whatever shafts of sense and reason, the shades of Blackstone and Story, reading these Regulations to their amazement, would believe themselves being cleansed, as in purgatory, within the strange cacophonies of a very upside-down, un-Gilbertian "Iolanthe"!

If the peculiar and extremely spare provisions of the Consular Court Regulations of 1864 as to limitation of actions suffices for modernized American business conditions in China, how is it their incognito draftsmen did not also include a Statute of Frauds? a Statute of Uses? a Rule in Shelley's Case?

Of course the Consular Court Regulations are not statutes at all. They are at best rules of court by the Minister,—an officer empowered to adjudicate, but who is not known ever actually to have held court,—the chief executive officer of the United States in

China. If these regulations possess the vitality of statutes,—statutes that are so superior that, in accordance with

In re Ross (1891) 140 US 453; 35 L ed 581,

even the Constitution is powerless to apply to them, the United States entered in 1864 upon a most novel jurisprudence! And there we stick! Let us concede the Regulations may have had some steadying influence upon consular officers on the rare occasions for most of them when exigency compelled them to become, for the briefest time, consular judges. Let us concede the Regulations force of law in so far as they did not conflict with or make unavailable actual law. Beyond this no potency can rightly be ascribed to them.

Brief for Appellant (Bf Aplt 30, 10) mentions Section 5 of the Act of June 30, 1906, creating the United States Court for China,—that section dealing with procedure and requiring that the procedure of the Consular Courts, which the Court for China superseded in greater part, be followed in the Court for China, so far as applicable. If the test of being applicable does not leave the Court for China discretion to say when and in which respect, what could have been intended? And, may we add?—is the right use of such discretion open to review?

For the very wide areas and the diversities of jurisdictions that constitute the reviewing jurisdiction of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and because of the century-long close commercial relations of San Francisco and

the ports of Eastern Asia, there is a form of judicial notice, even if not a notice on part of some counsel, that the Federal Government has always provided through Congress for protection and advancement of American interests, and it would appear most natural and reasonable that the law of the District of Columbia, so far as suitable and practicable, should be resorted to for those purposes rather than the law of the Territory of Alaska. And this must, in natural course of events following *Biddle v. United States,* come about. Surely it is not unknown at San Francisco that the one code of law commonly used by and upon the desk of every American attorney at Shanghai is the District of Columbia Code. The Consular Court Regulations have been moribund these thirty years. Why resist at San Francisco those practicing at the bar in Shanghai and benefiting in practice from not at all mourning the Consular Regulations of 1864, at least in most of their body long since departed?

POINT TWO: IN ADDITION TO GOOD DEFENSE ON LIMITATION OF ACTIONS THE ANSWER WELL PLEADED OTHER GOOD DEFENSES, TO WIT:

(a) LAWFUL TERMINATION OF AGREEMENT INCOMPLETE FROM ITS INCEPTION

(b) NO CONSIDERATION

(c) FAILURE OF CONSIDERATION

AND WITH ANY ONE OR MORE DEFENSES GOOD, THE JUDGMENT STANDS

If plaintiff-appellant shall have qualified for review and, further, shall have prevailed as to the Statute of Limitations, he will, as in the second part of his Brief, desire this Court of Appeals to consider the merits as shown in the pleadings.

Judgment on pleadings is in most cases unfavored. In its more favored position it is upon an agreed case where no issue of fact exists. In a controversial case, especially such as Chalaire v Franklin with pleadings not confined to ultimate but including evidentiary allegations, the very purpose of trial, the findings of fact, is frustrated, and, also, in such case, the rulings on law are obviated. The judge, as a consequence, is to change over to the rôle of arbitrator, a rôle which he must find extremely restrictive of judicial power.

In the instant case defendant pleaded affirmatively and plaintiff omitted to counter-plead. To one who reads the pleadings observantly there is much more of fact within the pleadings than the mere words state. The times and circumstances; two lawyers in partnership, closing that partnership with such non-sufficient

inclusion of terms as probably neither of them would allow himself to overlook were he advising clients; the friendly and informally expressed expectations and inducements synchronous therewith; a probably long extended course of friendly composition; very likely a proposal to arbitrate, and eventual realization that a competent and impartial arbitrator would be difficult to find; then a newly appointed judge, coming to a foreign jurisdiction, and fresh upon his coming to the bench, and with only a few members of the bar in active practice, one of the members is sued by a former member over the closing of a law partnership. Of all these facts and probable facts the trial judge had judicial notice. For enabling the judge to acquire and use judicial notice of conditions of American life and business in China his term of office is made ten years, and he is eligible for re-appointment.

These matters in mind, we believe it likely the Court of Appeals will not be interested favorably to consider the merits. If, however, the Court of Appeals is interested, we shall request leave to reply for Appellee orally and with appropriate reference to authorities sustaining the propositions that there was here:

(a) Lawful termination of agreement incomplete from its inception;

(b) No consideration;

(c) Failure of consideration

Each such affirmative defense was well pleaded, was not anticipated in the complaint and was not replied to. Wherefore, any one or more defenses being good, the judgment stands.

Equally with the foregoing and part of Brief for Appellee is the following:

MEMORANDUM BY FRANKLIN & HARRINGTON, OF COUNSEL, SHANGHAI, CHINA

I. THE LAW CLAIMED BY US TO BE APPLICABLE:

Title 24, ch. 12, sec. 341, of the District of Columbia Code provides that no action shall be brought upon any simple contract, express or implied, after three years from the time when the right to maintain any such action shall have accrued. (March 3, 1901, 31 Stat. 1389, ch. 854, sec. 1265, June 30, 1902, 32 Stat. 542, ch. 1329.)

II. WHY ABOVE LAW IS APPLICABLE:

"Such jurisdiction in criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute said treaty, extended over all citizens of the United States in China, (and over all others to the extent that the terms of the treaty justify and require) so far as such laws are suitable to carry said treaty into effect."

> 1848, August 11, 9 U. S. Stats. at Large, p. 276, c. 150, sec. 4. Re-enacted 1860, June 22, 12 U. S. Stats. at Large, p. 72, c. 179, sec. 4.

These Acts afford the basis of American jurisprudence in China.

> See *U. S. ex rel. Raven v. McCrea*, 1 Extraterritorial Cases 655, 659 (1917).

The law so "extended" is the law promulgated in the Acts of Congress.

See *U. S. v. Allen,* 1 Extraterritorial Cases 308, 311 (1914).

"Thus Congress may enact a law for a limited area under its exclusive jurisdiction such as Alaska or the District of Columbia; by its terms it may have no force whatsoever outside such area; but if it is 'necessary to execute such treaties' (with China) and 'suitable to carry the same into effect' it becomes operative here by virtue of the Acts above cited."

The Acts of Congress relating to the District of Columbia are among the laws of the United States so extended to this jurisdiction.

U. S. v. Biddle, 1 Extraterritorial Cases 120 (1907) affirmed in above respect, (reversed on the information and on merits) by the C.C.A., 9th Circuit in 156 Fed. 759. *Cavanagh v. Worden,* 1 Extraterritorial Cases 365, 370. *Roberts v. Roberts,* 1 Extraterritorial Cases 916. *Finance Bank v. Luebbert's Pharmacy,* Case No. 3682, Civil No. 1677, (1934) U S. Court for China.*

That Congress did not have China in mind when the Statute was enacted is immaterial. *Biddle v. U. S.,* supra.

*A certified copy of this opinion has been filed on behalf of appellant in the instant appeal.

III. REFUTATION OF OPPOSING ARGUMENTS:

It is inescapable that the provisions of the District of Columbia Code apply if applicable. Compare *Finance Bank v. Luebbert's Pharmacy,* supra. There is no question but there should be a Statute of Limitations applicable to this jurisdiction. Counsel for plaintiff admits this by claiming that the Statute of Limitations contained in the old Consular Court Regulations is applicable. The terms of the Statute are not important; the question is whether there is a Statute applicable. That the period of limitation for actions for breach of a written contract varies in the several states and the several federal jurisdictions is irrelevant. The question is whether a statute of limitations enacted by Congress is suitable and therefore is applicable in this jurisdiction. It is unimportant whether the Statute provides a period of limitations of three years or six years.

It is argued by counsel for plaintiff that the three year period of limitations contained in the District of Columbia Code of 1901 had been the law in the District of Columbia for a century prior to that date by virtue of an Act of Congress extending the laws of Maryland over the District of Columbia and that therefore the Consular Court Regulations of 1864 could never have been enforcible because in 1864 when the Consular Court Regulations were promulgated the Act of Congress was in force adopting the law of Maryland as the law over the District of Columbia. We submit that an Act of Congress extending the law of Maryland over the District of Columbia is not

an Act of Congress within the meaning of that term as used in the Statutes and Decisions making the Acts of Congress applicable to the United States Court for China. An Act of Congress extending the laws of Maryland over the District of Columbia is not the same as an Act of Congress enacting a Statute of Limitations for the District of Columbia. Until the enactment of the District of Columbia Code there was no law enacted by Congress providing a Statute of Limitations for the District. It is therefore immaterial what law applied in the District of Columbia prior to the enactment by Congress of the District of Columbia Code.

The case of *Gwin v. Brown,* 21 App. D.C. 295, relied upon by counsel for the plaintiff, is distinguishable, first, because in that case two *statutes* of limitations were involved while in the present case we are concerned with only a statute and a rule of court, (see Hinckley on American Consular Jurisdiction in the Orient, p. 55, quoting Bayard, Secretary of State); and second, because the cause of action in the instant case was not pending when the District of Columbia Code was enacted in 1901. Therefore the doctrine of Stare Decisis is inapplicable in regard to the construction placed by the District of Columbia Court upon the effect of the enactment of the 1901 Statute.

In 1933, in the case of the *Meh Teh v. Yangtsze Rapid Steamship Company,* Cause No. 3342, the United States Court for China held the Statute of Limitations of the District of Columbia applicable and from the Bench dismissed one of the causes of

action in the plaintiff's complaint. In the case of *Sun and Mih v. American-Oriental Bank,* Cause No. 3520, the Court by way of dictum stated that the Consular Court Regulations in regard to the limitation of actions should prevail. This statement was not the basis of the determination of the case as the plaintiffs had agreed to have their cash guarantee deposit used as a part of Dello & Company's margin account with the Bank and by so doing they assumed the risk that such deposit might be appropriated by the Bank in the event Dello & Company failed to carry out its obligations under various letters of credit. The reference to the Statute of Limitations could not possibly be construed as the ratio decidendi of the case.

Under the common law a doctrine had grown up to the effect that while *a dictum* may be entitled to great respect on account of the learning or general accuracy of the judge who pronounces it, it is not the judicial determination of the court and, therefore, is not entitled to the force and effect of precedent.

> *Black, Interpretations of Laws* (1896), 394, Sec. 148, note 83; *Wells, Res Adjudicata and Stare Decisis* (1879), c. XXXIX, p. 527; 15 *C. J.* 950, sec. 344; *Crescent Ring Co., Inc., v. Traveler's Indemnity Co.,* 102 N.J.L. 85, 132 Atl. 106 (1928).

> "A dictum is an expression of opinion in regard to some point or rule of law, made by a judge in the course of a judicial opinion, but not necessary to the determination of the case before the court. It may either be put forth as the personal opinion of the judge who delivers the judgment of the court, or introduced by way of illustration, argu-

ment, or analogy, but not bearing directly upon the question at issue, or it may be statement of legal principle over and above what is necessary to the decision of the controversial questions in the case."

Black, Interpretation of Laws, 394, sec. 148.

The general rule broadly stated by the United States Supreme Court is that to make an opinion a decision "there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties."

Carroll v Lessee of Carroll (1853) 16 How 275, 287; 14 L ed 936, 941; *Cohens v Virginia* (1821) 6 Wheat 264, 399; 5 L ed 257, 290; *United States v County of Clark* (1877) 96 US 211, 218; 24 L ed 628, 630.

Even if the dictum in the case of *Sun and Mih v. American-Oriental Bank,* supra, was a definite ruling and part of the ratio decidendi of the case it would still not be binding on the United States Court for China as it is not the decision of an appellate court. (For the same reason obviously it would not be binding upon the Circuit Court of Appeals.) It is not a question of the application of the historical declaration that "The House of Lords never overrules itself." When a rule or principle of law has been fully recognized by the Supreme Court it should not be overruled unless it is palpably wrong or has been changed by legislative enactment.

Lemp v. Hasting, 4 G. Greene 448 (Iowa). See also *State v. Silvers* 47 N.W. 772; *Kapp v. Kapp* 99 Pac. 1077; *State v. Taylor* 53 Atl. 392; *Fidelity & Deposit Company v. Nisbet,* 46 S.E. 444.

A single decision will not afford a basis for the application of the doctrine of Stare Decisis.

McDonald v. Davey, 22 Wash. 366, 60 Pac. 1116, 1117; *Kimball v. Grantsville City,* 19 Utah 368, 57 Pac. 1, 8, 45 L.R.A. 628, 635; *Garland v. State of Washington,* 232 U.S. 642, 646; 58 L. ed. 772; *Truxton v. Fait & Slagle Co.,* 42 Atl. 431, 438. See Black Interpretation of Laws, 411 sec. 153.

A single decision is not necessarily binding.

11 Cyc. 745.

"More than one decision," says Judge Martin in Smith v. Smith, 12 La. 441, "is required to settle the jurisprudence on any given point or question of law." "We have often said," said this Court in Lagrange v. Barre, 11 Rob. (La) 302, "it requires more than one decision to establish a jurisprudence."

Quaker Realty Company v. Labasse, 131 La. 996, 1008, 60 So. 661, 665.

If there is only a single decision on a question and the decision is plainly erroneous and no evil results would flow from a change, then the Court should adopt the better construction of the Statute.

McFarland v. Pico, 8 Cal. 626; *Remey v. Iowa Cent. Ry.,* 116 Iowa 133, 89 N.W. 218.

Plaintiff asserts that the Consular Regulations have not been modified, supplemented or superseded. Formal action to accomplish this is not necessary. See *Finance Bank v. Luebbert's Pharmacy,* Cause No. 3682, Civil No. 1677, United States Court for China (1934). The Maryland Statute of Limitations of 1715 in force in the District of Columbia was superseded by the District of Columbia Code, which took effect on January 1, 1902, without being specifically repealed.

McKay v. Bradley, 26 App. D.C. 449, 451.

It is submitted that the Consular Court Regulations were likewise superseded by the District of Columbia Code without being specifically repealed. This is borne out in the following excerpt:

> ". . . and if neither the common law nor the law of Equity or Admiralty, nor the Statutes of the United States, furnish appropriate and sufficient remedies, the ministers in those countries, respectively, shall by decrees and regulations which shall have the force of law, supply such defects and deficiencies."
>
> R.S. sec. 4086; Act June 22, 1860 c. 179, 12 Stats. at Large, p. 72.

The same problem was before the United States Court for China in the case of *Finance Bank v. Luebbert's Pharmacy,* supra. The District of Columbia

Code provided that 8% interest could be charged* and that Consular Court Regulations allowed 12% on judgments. The Court said: "The old Consular Regulations which were continued on the creation of this court except where changed by rule of court, allowed interest at 12% after judgment based on any sort of a demand or debt." The Court, holding that the provisions of the District of Columbia Code were applicable, said: "Since the Biddle case, the D. C. Code by policy and usage of this court has become the primary legislation for its jurisdiction. . . ." It is submitted that a repeal of the Consular Regulations can be implied from the "policy and usage" referred to.

Counsel for plaintiff refers to the Extraterritorial Remedial Code of Judge Lobingier and its provisions relative to limitations of actions. This Code was never promulgated.

The principal case relied upon by the plaintiff is that of the *United States v. Engelbracht,* 1 Extra-

*Note: In the 74th Congress, First Session, a bill was introduced as S 3097: Relating to interest and usury affecting parties under the jurisdiction of the United States functioning in countries where the United States exercises extraterritorial jurisdiction; it was referred to the Judiciary Committee.

For the Committee, Mr Hastings, Report No. 1081, May 13, 1935, stated: "It appears that United States courts, located in these countries, have held that such courts are bound by the laws of the District of Columbia upon this subject, which law fixes the legal rate of interest at 6 per cent.

"If this act is passed, it will permit persons to charge the same rate of interest as is fixed by the particular country in which the court is located.

"The other parts of the bill are copied from the District of Columbia law, with, of course, the necessary changes. This was deemed advisable because the courts in those countries have been following this law.

"A similar provision, applicable to banks, is provided in the Banking Act."**

It appears an amendment was accepted to effect that the "rate shall be the legal rate of interest provided by the laws of the country in which such jurisdiction is exercised; Provided, however, That in no case shall such rate of interest be more than 12 percent."*** [FEH and WHL, San Francisco]

**Apparently referring to 22 USCA 371b.

***Notwithstanding the foregoing the indexes of USCA August and October 1935 Special Pamphlets, Acts of 74th Congress, Jan 3, 1935 to end of Session, do not indicate that the bill became law.

territorial Cases 169. This case is distinguishable because the Statute of Limitations involved in that case referred to criminal cases instituted by indictment or information. The opinion of the Court itself is careful to point out that indictments are not used in the United States Court for China and the informations filed are quite different from the informations contemplated by the Federal Statute in question. Furthermore, the same argument with reference to the *Engelbracht* case on the question of Stare Decisis could be made as was made above with reference to the case of *Sun and Mih v. American Oriental Bank.*

This case does not involve the interpretation of the law but only its application. This being a unique jurisdiction and far removed, the local judge is best qualified to determine what statutes are applicable.

The foregoing Memorandum was prepared by Counsel at Shanghai, China.

Dated: December 20, 1935

Respectfully submitted,

FRANK E. HINCKLEY
W. H. LAWRENCE
Attorneys for Appellee

APPENDIX I

IN THE UNITED STATES COURT FOR CHINA

<table><tr><td>FINANCE BANKING CORPORATION, LTD.,
Plaintiff,
vs.
LUEBBERT'S PHARMACY, FED. INC.,
Defendant,
and
MILLINGTON, LIMITED, et al.,
Intervenors</td><td>Cause No. 3682
Civil No. 1677
Filed at Shanghai, China,
July 10th, 1934
William T. Collins Clerk.</td></tr></table>

OPINION

Plaintiff seeks to foreclose its mortgage, upon all the assets of the defendant, in the sum of $45,902.52 local currency, with interest at the rate of 12% per annum. The defendant corporation is in default, but certain unsecured creditors and certain majority stockholders of the corporation seek to intervene to ask for a receiver and to interpose the defense of usury based upon the 12% rate and other alleged charges.

Although usury is a defense personal to the defendant, yet under circumstances similar to these courts of equity usually permit creditors and stockholders to raise the question of interest when the defendant fails to do so. This appears to be the modern tendency.

The precise and narrow issue is what rate of interest can be enforced against defendants in this court,

and it is strange that after all these years the issue should be presented as a new and unsettled one. In 1923, in the case of Massey vs. Fernbach, No. 2177, this court held specifically that the District of Columbia Code governed the matter in this jurisdiction, but erroneously applied a maximum rate which had previously been reduced in the District of Columbia. The intervenors contend there is no alternative but to follow the District of Columbia Code, while plaintiffs vigorously assert it is not adapted to local conditions and therefore not in force under the terms of the Congressional Act which extended laws of the United States to this jurisdiction, but recited that "in all cases where such laws are not adapted to the object * * * the common law * * * shall be extended in like manner". Plaintiff reminds the court that limitations on interest rates were unknown at common law but that usury is purely of statutory creation, and urge the conclusion that in this jurisdiction "the sky is the limit". It is argued in this connection that the local prevailing rate of interest limit does not foster commerce.

The District of Columbia Code, in brief, provides the rate of interest in the absence of express contract shall be 6%, but that parties to a written instrument may contract for interest at 8%. The penalty against a creditor for charging more is forfeiture of all interest. Under the so called "Loan Shark" Act of the District of Columbia, which is not pertinent in this cause, 12% may be charged on small loans. The old Consular Regulations, which were continued on the creation of this court except where changed by rule of court, allowed interest at 12% after judgment based on any sort of demand or debt. Although this Consular Regulation seems never to have been modified formally, it has apparently been ignored for many years.

Since the Biddle case, the District of Columbia Code by policy and usage of this court has become the primary legislation for this jurisdiction, and consequently the question here apparently centers on adaptability. Habitually to test adaptability too freely tends to put this tribunal in the anomalous position of both legislator and court. The task should be undertaken with great caution and with inquiry into the desirability, wisdom or merits of legislation. Under the guise of testing the adaptability of the laws of the United States, this court should not reject appropriate statutes merely because it might wish they had been drawn differently. In this jurisdiction we may not have the benefit of choosing to be bound by only such laws of the United States which we like and of ignoring what we dislike.

No formal evidence was offered to prove the prevailing rate of interest charged for ordinary and commercial loans in this community, although able counsel on both sides argued these matters of fact. So far as common knowledge goes the interest rates charged Americans vary in this jurisdiction but are not materially different from the District of Columbia and there seems to be no established rate. It is true usury was unknown at common law, but universal legislation on the subject has so fixed our policy that it is hard to conceive of a jurisdiction without an interest limit. The Congressional attitude toward usury may be gathered from Sec. 85, Title 12, U.S.C.A. which provides that when no rate is fixed by the laws of the State or Territory or District, a National Bank may charge not exceeding 7%.

In view of the foregoing, it is decided that the District of Columbia Code governs the rate of interest which shall be enforced against defendants in this court.

In view of the uncertainty which has existed, it is clear that plaintiff had no illegal intent to make a usurious contract, and consequently the forfeiture provision of the District of Columbia Code will not be enforced, but interest in excess of 8% will be eliminated after computing the true amount of the debt. A receivership appears undesirable at this stage, but a decree of foreclosure will be entered and any surplus over judgment and costs arising from the foreclosure sale will be paid into the registry of the court, and the court will retain jurisdiction of the cause for such further proceedings as may be deemed advisable.

Milton J. Helmick
Judge.

Dated this 10th day of July, 1934.

APPENDIX II

Excerpt from opinion of United States Court for China (unreported) given October 5, 1933, Milton D. Purdy, Judge, Cause No. 3520, *Sun and Mih v American-Oriental Banking Corporation:*

> "Of course Congress has undoubted right to prescribe whatever limitations it deems proper with respect to both civil and criminal actions cognizable in the United States Court for China; but it seems to me that Congress never intended to provide limitations of actions in the United States Court for China by such roundabout and indirect manner as through the instrumentality of the Code of the District of Columbia.
>
> "The Consular Court Regulations with respect to the limitation of actions were in force and operation in the American Consular Courts in China for more than thirty years prior to the establishment of the United States Court for China. Such Rules and Regulations were admittedly suitable and proper when framed and promulgated by Minister Burlingame in 1864. At that time there was no general law of the United States, nor is there one now prescribing periods of limitation for the prosecution of civil actions between private parties. It was therefore appropriate, if not absolutely necessary, that some such rule as the one in question be prescribed and included in the Consular Court Regulations which were published by the Minister. Again, these Rules and Regulations seem to me to have been in effect ratified and approved by Congress. They

were published and promulgated by the Minister under authority conferred upon him by Sec. 4117 of the Revised Statutes, and they were required by Sec. 4119 of the Revised Statutes to be transmitted to the Secretary of State and by him laid before Congress for annulment or modification. (R. S.—Sec. 4118/4119) And if we now turn to the provisions of the Act of Congress establishing the United States Court for China we find the following:

> 'The procedure of the United States Court for China shall be in accordance, so far as practical, with the procedure prescribed for Consular Courts in China in accordance with Chapter 2 of this Title.'

[*This is not a correct copy of the part of the Act that presumably was in mind. Attorneys for Appellee, Dec. 20, 1935.*] That is to say, in accordance with Sec. 4117 of the Revised Statutes (22 U. S. C. A.—Sec. 146) which was the very provision of law under and pursuant to which Minister Burlingame in 1864 adopted and published the Consular Court Regulations for China.

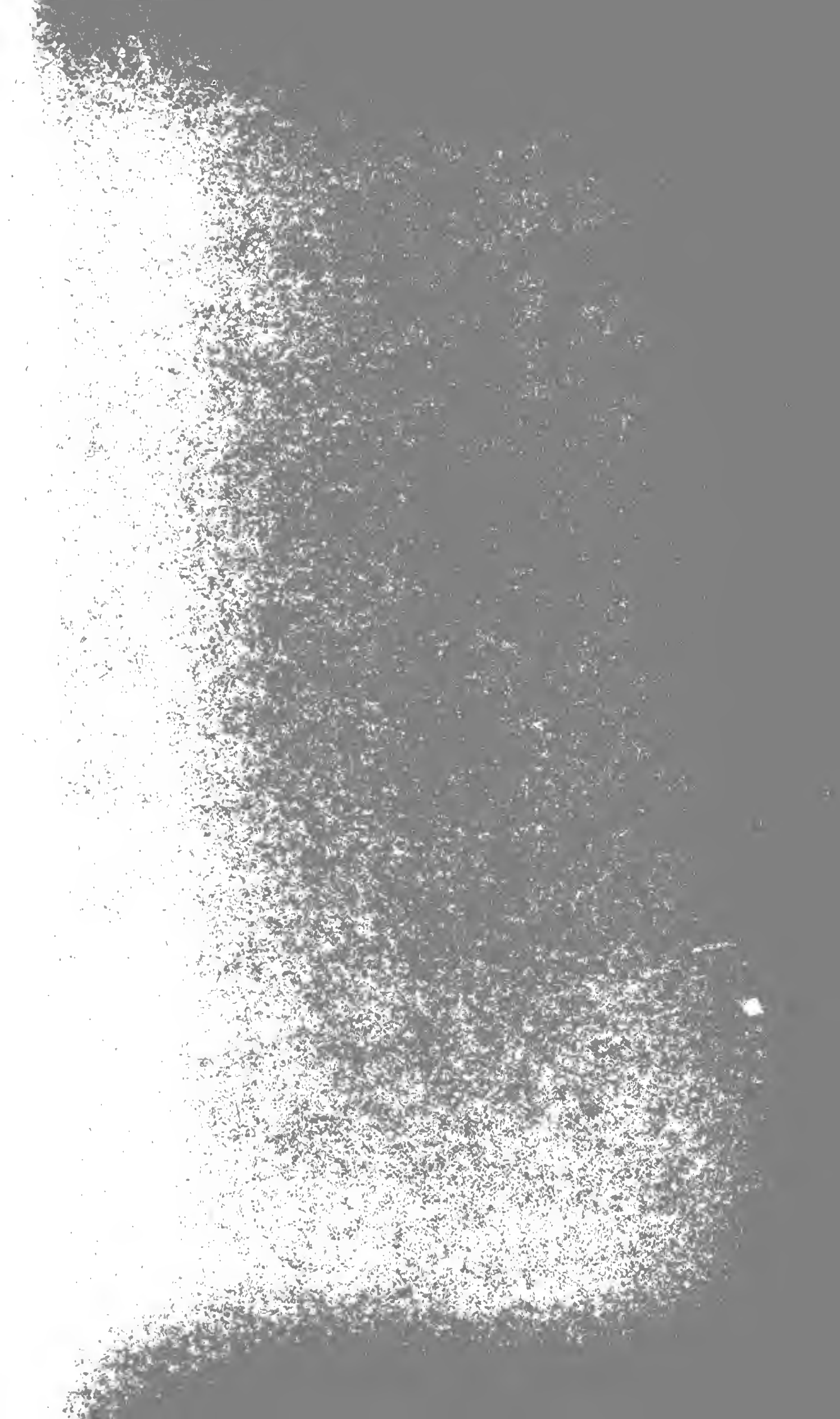
"Taking all these matters into consideration I am satisfied that the limitation of six years contained in the Consular Court Regulations for China is the law of this jurisdiction with respect to the period within which a contract may be prosecuted. I therefore hold that this action has not been barred by the Statute of Limitations as claimed by the defendant."

APPENDIX III

Comment on *Meh Teh Co v Yangtsze Rapid SS Co* (1932) (unreported), United States Court for China

Excerpt from copy of "Memorandum Brief in Support of Motion for New Trial" by Attorney for Plaintiff in Chalaire v Franklin in the United States Court for China, the case now No. 7753 in the Circuit Court of Appeals, Ninth Circuit. In the trial court the case was Cause No. 3628, Civil No. 1659. Referring to *Sun and Mih v American-Oriental Banking Corporation* (Supra, Appendix II) the brief continues:

> "Indeed, the six year period of limitation had become so deeply grounded in the procedure of this jurisdiction that, so far as counsel is aware, neither the United States Court for China nor any Consular Court had ruled in favor of any other period until December 14, 1932, when your Honor's immediate predecessor, Judge Purdy, in Meh Teh Co. v. Yangtsze Rapid S. S. Co., Cause No. 3342, for the first and only time applied the three year limitation of the D. C. Code. Judge Purdy apparently thought the question was one of first impression, and he gave an off-hand opinion from the bench. As stated above, however, the same Judge, about eight months later, on October 5, 1933, in a more carefully considered and written opinion, in C. E. Sun and W. D. Mih v. American-Oriental Banking Corporation, Cause No. 3620, reversed the former ruling by declaring that the six-year limitation of the Regulations takes precedence over the three year period of the D. C. Code of 1901."



REPRINT

United States Circuit Court of Appeals
Ninth Circuit

Appeal from
United States Court for China

WALTER CHALAIRE,
Appellant

v

CORNELL S. FRANKLIN,
Appellee

No. 7753

MOTION TO AFFIRM JUDGMENT

Attorneys for Appellee: Frank E. Hinckley and W. H. Lawrence, both of San Francisco, California.
Of Counsel: Franklin & Harrington, Shanghai, China.

PERNAU-WALSH PRINTING COMPANY, SAN FRANCISCO

United States Circuit Court of Appeals
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Appeal from
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WALTER CHALAIRE,
Appellant

v

CORNELL S. FRANKLIN,
Appellee

No. 7753

MOTION TO AFFIRM JUDGMENT

Appellee respectfully presents this motion to affirm, stating as facts and objects hereof:

The Transcript of Record shows:

Amended complaint

Answer to amended complaint, with affirmative defenses

Motion of plaintiff, appellant here, for judgment on the pleadings

"Complaint will be dismissed", which were words at close of opinion, September 14, 1934

Judgment dismissing complaint, November 26, 1934

Exception to judgment, December 15, 1934

Affirmance, rather than dismissal, is sought, affirmance being in line with authority.

As grounds of this motion appellee assigns:

One: An appeal qualifying for hearing and further consideration is wanting, since

(a) There was failure of essential appellate procedure prior to filing transcript of record; and

(b) Omission of replication, then moving for and obtaining judgment on the pleadings without requesting and excepting to, before judgment, special findings and rulings, precluded obtaining basis for appeal.

Two: On above stated grounds for dismissal of appeal, and on face of record free of reversible error, there is precedent that the judgment be affirmed.

Herewith are notice, and points and authorities.

Dated: December 20, 1935

Respectfully presented,

Frank E. Hinckley

W. H. Lawrence

Attorneys for Appellee

NOTICE

Messrs McCutchen, Olney, Mannon & Greene
Farnham P. Griffiths, Esquire
George E. Dane, Esquire
Attorneys for Appellant

You are hereby notified that upon opening of usual session on December 20, 1935, or as soon thereafter as may be heard, we will present above motion to affirm judgment.

Frank E. Hinckley
W. H. Lawrence
Attorneys for Appellee

Due service of above motion to affirm judgment, and receipt of copy thereof and of copy of points and authorities, December 14, 1935, are hereby admitted.

McCutchen, Olney, Mannon & Greene
Farnham P. Griffiths
George E. Dane
Attorneys for Appellant

POINT ONE (a): AN APPEAL QUALIFYING FOR HEARING AND FURTHER CONSIDERATION IS WANTING, SINCE THERE WAS FAILURE OF ESSENTIAL APPELLATE PROCEDURE PRIOR TO FILING TRANSCRIPT OF RECORD.

In the judgment (Tr 24, 2 and 7) dismissing complaint the Court noted: "plaintiff excepts". No earlier indication of exception occurs. Thereafter by 19 days, and with no showing of service on defendant or of request for ruling of court, plaintiff filed "Exception to Judgment Dismissing Complaint". How these measures, first to last, could entitle plaintiff to appeal is a large question.

It may be that having proceeded by motion for judgment on pleadings, and with motion granted and judgment made, plaintiff apprehended he had forfeited right to request findings and rulings in course of trial. He had. But he appears to have overlooked the situation that course of trial would close with judgment, whereas at the end of the opinion (Tr 23, 8), rendered 73 days before judgment, the Court had stated: "Complaint will be dismissed". This definitely informed plaintiff what the judgment would be. It was of nature of order for judgment. In federal practice a judgment not required to be signed by the Judge would in due course have been entered by the Clerk, but before this entry and within time fixed in federal practice plaintiff could at least have requested general finding and ruling of the court on the request and could have reserved exceptions thereto. The failure to do so in this case we must regard as fatal to essential procedure for appeal.

Also in the substance of the "Exception to Judgment" there is failure fatally against right to appeal. The effort is to specify. Eight supposed specifications are made. The same eight, in same language, appear later in the record as assignments of errors. One of these, an error of a 2 instead of a 3 in the tens of a month, is paltry. (Bf Aplt 8, 5 and 11). Three others are not used in Brief for Appellant; hence abandoned. Of the four others, two are but reciprocal to the other two. The specification placed first is that the Statute of Limitations applicable in China is Section 83 of the Consular Court Regulations of 1864, and not that applied in the judgment, to wit, the District of Columbia Code, Title 24, Section 341. To claim this for exception the assumption is ventured, an assumption excluded by law, that the opinion is part of the judgment, for it is not in the judgment, but in the opinion that the District of Columbia Code is accepted by specific reference. Of course the opinion, by mention in the judgment or in any other way, cannot be taken as integrated into the judgment. Besides, when plaintiff omitted before judgment to request special findings and rulings or at time of judgment to request a general finding or ruling, he passed by his procedural opportunities. Yet in a general finding or ruling nothing could have been added to substance. It was only an exception of general nature he could then save.

Appeals from China are regulated by procedure from District Courts, so far as applicable.

> Act of Congress Jun 30, 1906, 34 Stat 814, Sec 3; 22 USCA 194

In a case from China in which no exception was made until nearly 60 days after judgment (In the instant case 92 days after opinion of the Court stated that judgment would be against the party who is appellant) this Court of Appeals said:

> "It would seem to be a simple matter to conform to the established procedure and practice."
>
> *China Press v Webb* (1925) 7 F 2d 581, 583; Gilbert, *Hunt,* Rudkin, CJJ

> "To obtain a review by an appellate court of the conclusions of law a party must either obtain from the trial court special findings which raise the legal propositions, or present the propositions of law to the court and obtain a ruling on them. . . . These rules necessarily exclude from our consideration all the questions presented by the assignment of errors except those arising on the pleadings."
>
> *Fleischmann Constr Co v United States* (1926) 270 US 349, 356; 70 L ed 624, 629; Mr Justice *Sanford*

It is questionable whether there is, strictly, in this case any fact whatever, even those well pleaded, open to appellate review.

> "In the case at bar it is clear, we think, that if we pass upon the questions of sufficiency of the evidence to justify the judgment, we will be in

effect considering an exception which was not in fact made, upon a question which was not even presented for the consideration of the trial court at the time fixed by law therefor."

First Natl Bank of San Rafael v Philippine Refining Corporation of New York (1931) 51 F 2d 218; *Wilbur* and Sawtelle, CJJ, Neterer, DJ

Appellant's Brief, however, devotes more than eight pages (33-42) to argument on particulars of fact alleged in the pleadings.

However, we understand that in addition to the above authority against reviewing evidence where proper appeal has not been laid, there is special reason in the instant case for not bringing alleged facts set forth in the complaint into an assignment of errors; for, on motion by plaintiff, as here, for judgment on the pleadings, the allegations of the answer by defendant are deemed admitted. Fair turnabout restrains also the defendant because of his motion of like nature; but this does not apply, we think, to the answer in its Paragraph 3, and certainly not to the so designated First, Second and Third Separate and Distinct Defenses (Tr 16-18), the Third being on the Statute of Limitations. The two motions for judgment on the pleadings were distinctly independent one of the other. If then any matter of fact in the pleadings has become reviewable, the answer from Paragraph 3, inclusive, contains matter of fact which plaintiff is deemed to have admitted, being, as the opinion recites, "new matter by way of affirmative defense".

Mara v United States (1931) DC SDNY, 54 F 2d 397, 400; Woolsey, DJ

POINT ONE (b): AN APPEAL QUALIFYING FOR HEARING AND FOR FURTHER CONSIDERATION IS WANTING, SINCE OMISSION OF REPLICATION, THEN MOVING FOR AND OBTAINING JUDGMENT ON THE PLEADINGS WITHOUT REQUESTING AND EXCEPTING TO, BEFORE JUDGMENT, SPECIAL FINDINGS AND RULINGS, PRECLUDED OBTAINING BASIS OF APPEAL.

The common law applies generally in United States jurisdiction in China. Affirmative defenses not anticipated in the complaint were pleaded, with verification. Plaintiff omitted counter plea of any nature. He then moved for judgment of the pleadings. Judgment against him followed. It is plain that although no one of the defenses is mentioned in the judgment, at least one of them, which one or more it does not matter, was adjudged good.

> "But where the plea introduces new matter and does not conclude to the country, but concludes with a verification, a replication must be made if plaintiff does not demur."
>
> 49 *CJ* 322, Sec 393

There was verification, conforming to practice in the China jurisdiction, and while it could be also considered that there was "conclusion to the country", that jurisdiction having no jury, had no "country" to "conclude to"! Anyway, the significance to plaintiff is that with affirmative defenses unchallenged and getting judgment on the pleadings, he is without saving of proper exceptions on which to obtain appeal.

POINT TWO: ON ABOVE STATED GROUNDS FOR DISMISSAL OF APPEAL, AND ON FACE OF RECORD FREE OF REVERSIBLE ERROR, THERE IS PRECEDENT THAT THE JUDGMENT BE AFFIRMED.

If the Circuit Court of Appeals, after considering the foregoing statement of grounds for dismissal and being satisfied that on face of the record there is not apparent reversible error, shall be disposed to grant a motion to dismiss, we will respectfully request that, instead, judgment be affirmed.

In thus affirming we understand that approval of the opinion of the trial court as expressing a view of the law is not to be inferred. In a comparable situation a petition to the United States Supreme Court for a writ of certiorari, granted or denied, in no way indicates approval or disapproval, but only that an apparent right of review is or is not recognized. (Only one petition for writ of certiorari from this Circuit Court of Appeals to the Court for China is found in the reports (*Curtis v Wilfley,* Judge (1908) 163 F 893); it was denied.) In a large proportion of the cases on review from China defect in preparing for appeal has prevented full measure of review. What the Court of Appeals held as to those parts of the appeals that were reviewable cannot be taken as showing what it would have decided on the non-reviewable parts. The appellate opinions show the disposition of the reviewing court to be considerate of the special difficulties of extraterritorial jurisdiction. Appeals are entertained to extent the law permits. The line of decisions on appeal to the Circuit Courts of Appeals throughout the United States we believe favors affirmance rather than dismissal in cases of the nature of the instant case.

In the United States Supreme Court an appeal of this description would, we believe, not be dismissed but affirmed.

In *James v Bank of Mobile,* cited below, in error to the Circuit Court for the District of Louisiana, on motion to dismiss, the Supreme Court said in opinion by Mr Chief Justice Chase:

> "The record in this case contains nothing but the declaration; the plea of the general issue; the proof of the protest of the bill of exchange indorsed by the defendant, and notice to him of non-payment, and judgment of the court in favor of plaintiff. There is no bill of exceptions, and nothing upon which error can be assigned.
>
> "But the regular course, in cases of this description is to affirm the judgments. The appeal is regularly here, and cannot be dismissed for want of jurisdiction. The motion, therefore, must be denied."
>
> *James v Bank of Mobile* (1869) 7 Wall 692, 693; 19 L ed 275

In *Gonzales v Buist,* cited below, on appeal from the District Court of the United States for Porto Rico, the Supreme Court, in opinion by Mr Chief Justice White, said:

> "There is nothing shown by the record which we can review, since what is denominated findings of fact is not such in legal effect, and the record does not contain any rulings of the court, excepted to upon the admission or rejection of evi-

dence. . . . No error being apparent on the record, the judgment . . . must be and it is affirmed."

Gonzales v Buist (1912) 224 US 126; 56 L ed 693, 695

In *Squibb & Sons v M. Chemical Works,* (cited below, on certificate from the Circuit Court of Appeals, Eighth Circuit, a question was:

"Where, on an appeal properly in this court, the appellee contends that one of the assignments of errors has been abandoned and all others are not presentable because defective either as assignments of errors or as specifications of errors and urges affirmance of the decree appealed from and this court determines that such contention is well founded in all respects and that no issue on the merits is, for such reasons, presentable to it, is it proper to affirm the degree appealed from?"

The question was answered, per curiam, in the affirmative *Squibb & Sons v M. Chemical Works* (1934) L ed Advance Opinions, vol 79, p 129

In aid of reference to the course of decisions as to appellate review in this Circuit Court of Appeals, we offer the following list of cases from the United States Court for China, believed to include all brought for review, indicating for each the nature of the decision.

Those starred involved questions of appeal and error or like questions of appellate review. Those double starred are of interest in the instant appeal, Chalaire v Franklin.

** 156 F 759 (1907) *Biddle v United States*
Reversed, with directions

* 165 F 893 (1908) *Curtis v Wilfley,* Judge
Petition for certiorari denied

* 167 F 125 (1909) *Toeg & Read v Suffert*
Dismissed

* 169 F 79 (1909) *Price v United States*
Dismissed

* 171 F 835 (1909) *Cunningham v Rodgers, Consul General*
Dismissed

* 193 F 973 (1912) *Cathay Trust v Brooks*
Reversed, with directions

* 213 F 737 (1914) *Connell Bros Co v Diedrichsen & Co.*
Affirmed

255 F 71 (1919) *Swayne & Hoyt v Everett*
Affirmed

** 274 F 774 (1921) *American Trading Co v Steele*
Affirmed
279 F 563 (1922) *Fleming v United States*
Affirmed

** 298 F 446 (1924) *Montgomery, Ward & Co v Banque Belge*
Affirmed

‡ 3 F 2d 369 (1925) *Green Star SS Co v Nanyang Bros Tobacco Co*
Affirmed

** 7 F 2d 581 (1925) *China Press v Webb*
Affirmed
10 F 2d 772 (1926) *Neuss, Hesslein & Co v Van der Stegen*
Remanded, with directions to dismiss

* 11 F 2d 715 (1926) *Wulfsohn v Russo-Asiatic Bank*
Affirmed

* 14 F 2d 586 (1926) *Andersen, Meyer & Co v Fur & Wool Trading Co*
Affirmed
18 F 2d 6 (1927) *Globe & Rutgers Fire Ins Co v King Foong Silk Filature*
Affirmed

* 23 F 2d 670 (1928) *Gillespie v Hongkong & Shanghai Banking Corp*
Affirmed

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‡*Green Star SS Co v Nanyang Bros Tobacco Co* involved objection to allowing amendment of answer to plead limitation of action by agreement.

26 F 2d 847 (1928) *Husar v United States*
Affirmed

28 F 2d 468 (1928) *National City Bank v Harbin Electric Co*
Reversed, and remanded for further proceedings

* 30 F 2d 278 (1929) *Republic of China v Merchants Fire Assur Corp*
Reversed, and remanded for further proceedings

* 30 F 2d 932 (1929) *Archer v Heath,* Warden
Reversed, with directions

* 33 F 2d 816 (1929) *McDonnell v Bank of China*
Reversed, and remanded; dissenting opinion

49 F 2d 8 (1931) *Republic of China v Merchants Fire Assur Corp,* Second Case
Affirmed

** 59 F 2d 8 (1932) *Yangtsze Rapid SS Co v Deutsch-Asiatische Bank*
Affirmed

* 66 F 2d 811 (1933) *Woo King-hsun v Pemberton & Penn, Inc*
Affirmed

** 71 F 2d 895 (1934) *Pickering & Co v Chinese American Cold Storage Assn*
Affirmed

Besides those cases above indicated as involving points in appeal and error or like questions of ap-

pellate review, there are important elements of others of the cases that bear upon right to and procedure for review.*

(The whole system of review from extraterritorial courts, especially from the British, could be profitably studied for purpose of understanding the principles and the practical difficulties. The partially extra-territorial, partially national jurisdiction of Japan with respect to Japanese subjects in China is also very enlightening as to the provisions for appeal and the problems of appeal generally, and particularly for original jurisdiction of certain larger issues to be exercised in Japan.)

We feel assured the foregoing listing demonstrates particularly, and after reference to the opinions, the bearing of Section 5 of the Act of June 30, 1906, creating a United States Court for China, in the provisions of the Act that the procedure for appeal from the District Courts shall govern the procedure from the Court for China. The Circuit Court of Appeals decisions have followed the statute. The statute is mandatory.

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*From the beginning, cases appealed from China have been dealt with frequently on points of procedure. In the first in date, one from Canton

Steamer Spark v Lee Choi Chum (1872) 1 Sawyer 713; Fed Cas No 13206

an attempt was made by able counsel, Milton Andros, to have the vessel itself be appellant. The record was but a mass of papers and did not include those requisite for appeal.

(As to a case from Hiogo (near Kobe), its record was fatally defective. *Tazaymon v Twombly* (1878) 5 Sawyer 79; Fed Cas No 13810)

From the Consular Court at Shanghai came

The Ping On v Blethen (1882) 11 F 607

involving jurisdiction to review. Whatever the record, judgment was reversed.

Of more recent opinions those of Circuit Judges Wilbur, Sawtelle and District Judge Neterer, thoroughgoing and illuminative, bring forward the obligation in exercise of appellate jurisdiction not to undertake the functions that should have been brought into operation at instance of counsel in the trial courts. In a case from the District Court for the Northern District of California, Southern Division, which considers fully a situation parallel to those developed on appeal from China, and which we should wish to read in its entirety,

> *First Natl Bank of San Rafael v Philippine Refining Corporation of New York* (1931) 51 F 2d 218 (cited above p 7)

the opinion reads:

> "In the case at bar it is clear, we think, that if we pass upon the questions of sufficiency of evidence to justify the judgment, we will be in effect considering an exception which was not in fact made, upon a question which was not even presented for the consideration of the trial court at the time fixed by law therefor".

In the case from China:

> *Yangtsze Rapid SS Co v Deutsch-Asiatische Bank* (1932) 59 F 2d 8, 10, 11, 12

there was a narrative "Findings of Fact". However, the Court of Appeals said:

> "At the outset we are confronted with the fact that there is no proper bill of exceptions. Rule 10 of this court provides in explicit language: '2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary

to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise.'

"This same rule applies to appeals from the United States Court for China. (Quoting from China Press, v Webb, cited above p 6)

"In the instant case, however, the court made special findings of fact and drew therefrom certain conclusions of law. Exceptions to the conclusions of law were duly preserved by appellant. The question before us is whether the findings of fact tend to support the judgment. This question may be determined without a bill of exceptions. (Quoting Fleischmann Constr Co v United States (1926) 270 US 349; 70 L ed 624; above cited, p 6.)

". . . While we agree that the assignments of error are drawn imperfectly and not in strict accordance with the rules of this court, we are disposed to regard them as sufficient to bring the issues of law before us. Accordingly, we will now proceed to consider the case on its merits.

"As we have said before, we are bound by the findings of fact, there being no proper bill of exceptions before us.

"Judgment affirmed."

Needless to observe, the foregoing case was in much better situation as to record on appeal and the elements of that record than the instant case.

Where a question of state law, that of Oregon, "was not made below, was not discussed by the lower court, and is not included in the assignment of errors filed in this Court. We have no occasion to consider it."

Pacific States Box etc Co v White (Nov 18, 1935) United States Supreme Court, Opinion by Mr Justice Brandeis, Law ed Advance Opinions vol 80, p 133, 139

In the last case from China before Chalaire v Franklin the record on appeal presented the old, often recurring and serious difficulties. The law firm of Pillsbury, Madison & Sutro, for appellant, made best possible effort to overcome these difficulties and the Court of Appeals considered their representations in detail and at length.

Pickering & Co v Chinese American Cold Storage Assn (Jul 15, 1934) 71 F 2d 895

The entire opinion will be read with greatest interest. We endeavor to aid fairly by making the following quotations:

"The court below rendered judgment on the sole ground that the contract . . . was void and unenforceable from its inception.

"The case was tried to the court, sitting without a jury. The bill of exceptions does not contain an exception to the ruling that the purported contract was void for uncertainty. The trial court wrote a "Decision and Judgment", which was entered as a judgment in the case. It specifically set forth the court's 'conclusion of law'

that the purported contract was void and unenforceable. The 'decision and judgment' set forth a statement of facts, interspersed informally with a discussion of the law. The court stated that its decision 'required specific findings of fact'; but no statement of facts by the court other than the informal and incidental references appearing in the decision and judgment, is to be found in the record.

"Incorporated in the "Decision and Judgment" of the court below is the following: 'My conclusion of law is that the contract 'Exhibit A' was void and unenforceable from its inception and that plaintiff is not entitled to recover damages for it having been breached by the defendant.' Immediately following this 'conclusion of law' is the closing paragraph of the 'Decision and Judgment': 'It is the order and judgment of the Court that above entitled action be dismissed and that defendant have and recover judgment against plaintiff for its costs herein.'

. . .

"The limitations upon the power of an appellate court to review causes in which proper findings of fact and conclusions of law were not made in the court below, and proper exceptions were not saved have been clearly and exhaustively discussed in recent decisions of the Supreme Court. As will be seen from excerpts that follow, those limitations are not discretionary upon the reviewing court; they are mandatory.

Quoting at much length from the case of Fleischmann Constr Co v United States (cited above p 6); also from

Harvey Co v Malley (1933) 288 US 415; 77 L ed 866,

and observing as to the first:

"The Circuit Court of Appeals (298 F 330) disposed of this case in a per curiam opinion stating that, while there was a serious question whether there was anything before it because of the want of due exceptions, it 'preferred' to rest the affirmance of the judgment on the merits, as it thought that the District Court was clearly right on all the points decided." and saying: "These rules necessarily exclude from our consideration all the questions presented by the assignment of errors except those arising on the pleadings. All others relate either to matters of fact or to conclusions of law embodied in the general finding. These are not open to review, as there were no special findings of fact and no exceptions to the rulings on matters of law were taken during the progress of the trial or duly preserved by a bill of exceptions. The defendants offered no exceptions to the rulings of the court until after the writ of error had issued, transferring jurisdiction of the case to the court of appeals. And the recitals in the subsequent 'bills of exceptions' that the exceptions, then for the first time presented, were to be taken as made before the entry of the judgment, are nugatory. A bill of exceptions is not valid as to any matter which was not excepted to at the trial. (Citations) And it cannot incorporate into the record nunc pro tunc as of the time when an exception should have been taken, one which in fact was not then taken. (Citations)

"The statute, however, relates only to those rulings of law which are made in the course of trial, and by its terms has no application to the preliminary rulings of the district judge made, in the exercise of his general authority, before the issues are submitted to him for hearing under the statutory stipulation. Such rulings on the pleadings and the sufficiency of the complaint are therefore subject to review as in any other case, independently of statute. (Citations)

"Since, therefore, the questions arising on the pleadings in this case are now open to review, the motion to dismiss the writ of error must be denied."

The Supreme Court then proceeded to consider the rulings on the demurrers, and held the demurrers were rightly overruled. Thereupon, judgment of the Circuit Court of Appeals was affirmed.

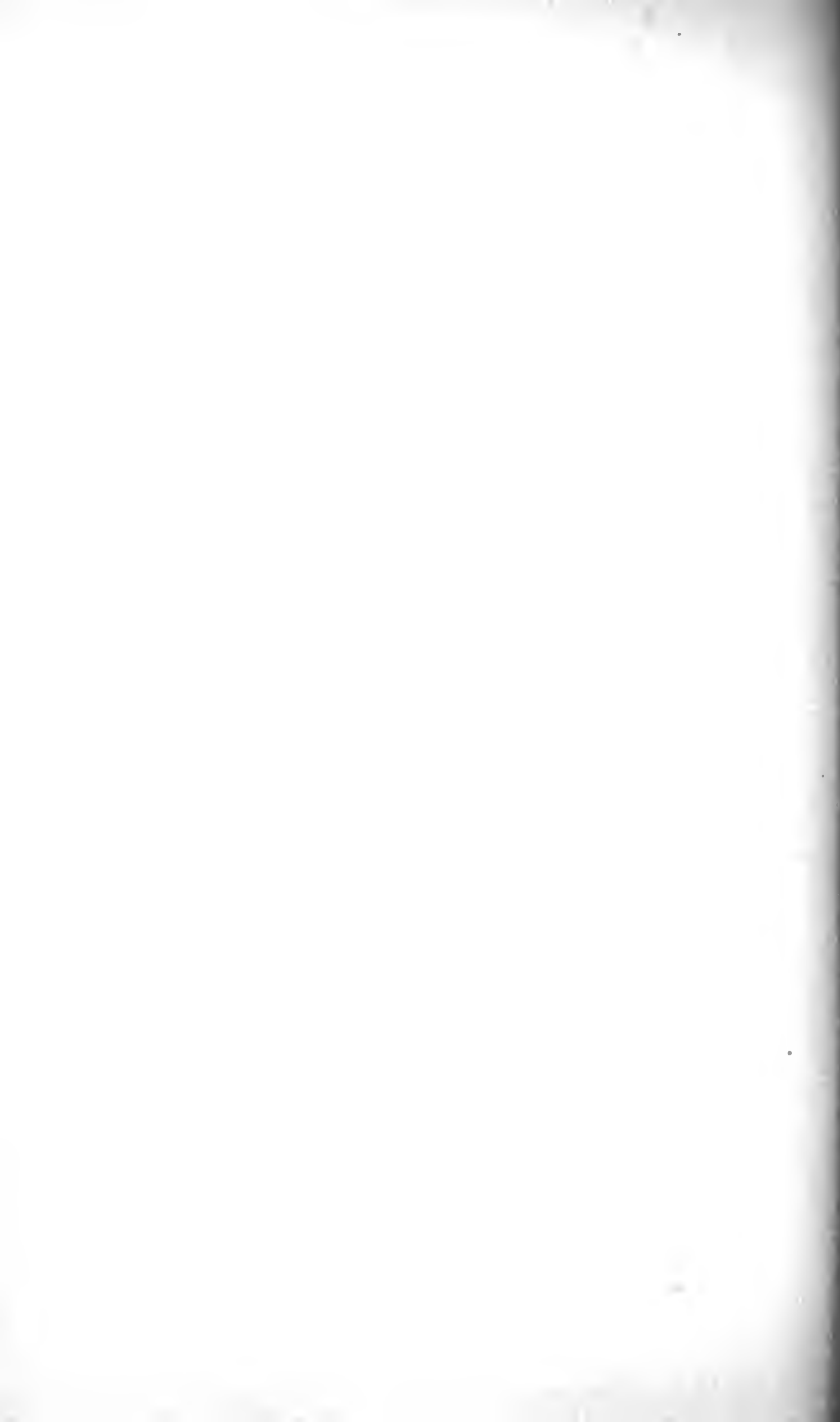
Dated: December 20, 1935

Respectfully submitted,

Frank E. Hinckley

W. H. Lawrence

Attorneys for Appellee



No. 7753

United States Circuit Court of Appeals

For the Ninth Circuit

Walter Chalaire,
Appellant,

vs.

Cornell S. Franklin,
Appellee.

Statutes and Regulations Referred to In Brief for Appellant.

Printed Herein for the Convenience of the Court.

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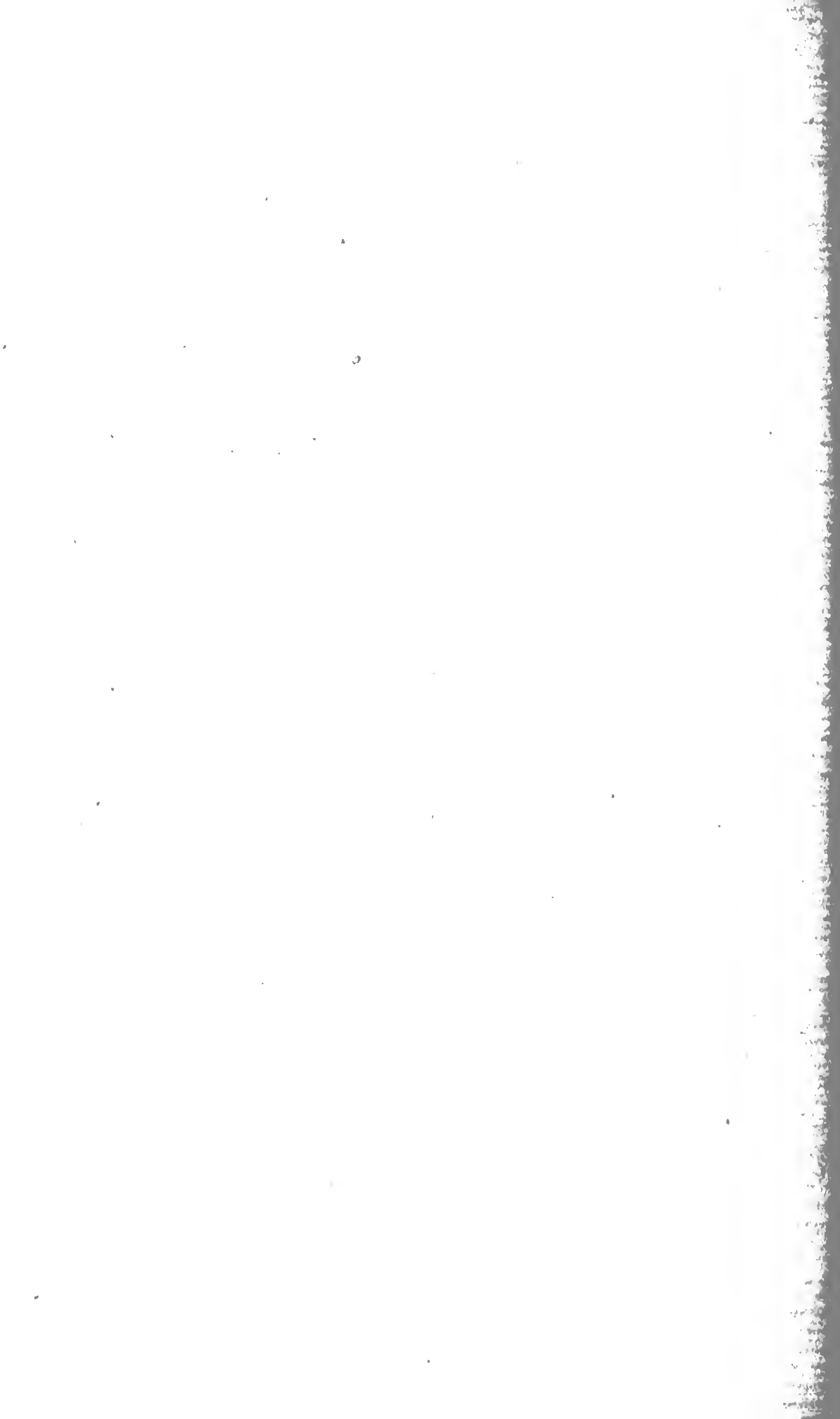

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No. 7753

United States
Circuit Court of Appeals
For the Ninth Circuit

WALTER CHALAIRE,
Appellant,

vs.

CORNELL S. FRANKLIN,
Appellee.

Statutes and Regulations Referred to In Brief for Appellant.

Printed Herein for the Convenience of the Court.

A. THE ACT OF 1860, PROVIDING FOR CONSULAR COURTS AND AUTHORIZING THE MINISTER TO MAKE REGULATIONS GOVERNING PROCEDURE THEREIN.

Act of Congress of June 22, 1860, Chap. 179, 12 Stat. 72-74:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, to carry into full effect the provisions of the treaties of the United States with the empires of China, Japan, and Siam, respectively, the minister and the consuls of the United States, duly appointed to reside in each of the

said countries, shall, in addition to other powers and duties imposed upon them, respectively, by the provisions of such treaties, respectively, be invested with the judicial authority herein described, which shall appertain to the said office of minister and consul, and be a part of the duties belonging thereto, wherein the same is allowed by treaty.

* * * * * * *

(Section 2 gives jurisdiction in criminal matters. Section 3 gives civil jurisdiction and provides for venue.)

* * * * * * *

Sec. 4. *And be it further enacted,* That such jurisdiction in criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, extended over all citizens of the United States in the said countries, (and over all others to the extent that the terms of the said treaties, respectively, justify or require,) so far as such laws are suitable to carry the said treaties into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law, including equity and admiralty, shall be extended in like manner over such citizens and others in the said countries; and, if defects still remain to be supplied, and neither the common law, including equity and admiralty, nor the statutes of the United States, furnish appropriate and suitable remedies, the ministers in the said countries, respectively, shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies.

Sec. 5. *And be it further enacted,* That in order to organize and carry into effect the system of jurisprudence demanded by such treaties, respectively, the said ministers, with the advice of the several consuls in each of the said countries, respectively, or so many of them as can be conveniently assembled, shall prescribe the forms of all processes which shall be issued by any of said consuls; the mode of executing and the time of returning the same; the manner in which trials shall be conducted, and how the records thereof shall be kept; the form of oaths for Christian witnesses, and the mode of examining all other witnesses; the costs which shall be allowed to the prevailing party, and the fees which shall be paid for judicial services to defray necessary expenses; the manner in which all officers and agents to execute process, and to carry this act into effect, shall be appointed and compensated; the form of bail-bonds, and the security which shall be required of the party who appeals from the decision of a consul; and generally, without further enumeration, to make all such decrees and regulations from time to time, under the provisions of this act, as the exigency may demand; and all such regulations, decrees and orders shall be plainly drawn up in writing, and submitted, as above provided, for the advice of the consuls, or as many of them as can be consulted without prejudicial delay or inconvenience, who shall each signify his assent or dissent in writing, with his name subscribed thereto; and after taking such advice, and considering the same, the minister, in the said countries, respectively, may, nevertheless, by causing the decree, order, or regulation to be published with his signa-

ture thereto, and the opinions of his advisers inscribed thereon, make it to become binding and obligatory, until annulled or modified by Congress; and it shall take effect from the publication or any subsequent day thereto named in the act.

Sec. 6. *And be it further enacted,* That all such regulations, orders, and decrees, shall as speedily as may be after publication, be transmitted by the said ministers, with the opinions of their advisers, as drawn up by them severally, to the Secretary of State, to be laid before Congress for revision.

B. THE CONSULAR COURT REGULATIONS OF 1864, PROMULGATED BY MINISTER BURLINGAME UNDER THE AUTHORITY OF THE ACT OF 1860, TOGETHER WITH THE MINISTER'S LETTER OF TRANSMITTAL TO THE SECRETARY OF STATE, THE NOTICE OF PUBLICATION BY THE CONSUL GENERAL, THE ASSENT OF THE CONSULS, AND THE SECRETARY'S ACKNOWLEDGMENT, ALL LAID BEFORE CONGRESS BY PRESIDENT JOHNSON WITH HIS ANNUAL MESSAGE, DEC. 4, 1865.

(This text is reprinted from pages 413-415, 419, 421 and 437 of Part II of *Message of the President of the United States, and accompanying documents, to the two Houses of Congress, at the commencement of the first session of the Thirty-ninth Congress,* being the second part, separately paged and bound, of Volume I of *Executive Documents printed by order of the House of Representatives during the first Session of the Thirty-ninth Congress,* Washington, Government Printing Office, 1866. Ho. Ex. Doc. Vol. I, No. 1,

part 2, 39th Cong., 1st Sess., pages 413-415, 419 and 421. There is a set of these documents at the San Francisco Public Library.)

Mr. Burlingame to Mr. Seward.

No. 94.)

LEGATION OF THE UNITED STATES

Peking, November 9, 1864.

Sir: I have the honor to send two decrees made by me, and approved by the consuls, in pursuance of the act of Congress approved June 22, 1860.

The *first* was rendered necessary by the irregularities of lawless men in connection with the Chinese rebellion; the *second* by the act of Congress aforesaid.

It will be observed that the *second* decree is largely taken from forms made by the United States consul general at Constantinople, which have already been submitted by you to Congress. With our minister, the Hon. E. Joy Morris, I wish to bear witness to the ability of Mr. Godard in this respect, and to beg that the credit ascribed to these rules may be transferred to him. I wish also to express my thanks to George F. Seward, esq., consul general at Shanghai, for many valuable practical suggestions. I am chiefly indebted to him for the fee bill. He came to Peking at my request to consult in relation to these decrees.

I have carefully compared these rules with those "framed for the supreme consular court, and other consular courts, in the dominions of the Sublime Ottoman Porte, under the order of her Majesty in council of the 27th day of August, 1860, by the judge of her Majesty's supreme consular court, and approved by one of her

Majesty's principal secretaries of state;" and while I find them covering the same ground, I think these of Mr. Godard are less elaborate and more practical. Their adoption, as far as possible, in the very language of Mr. Godard, is a great advantage. They need but to be adopted in Japan to secure a uniform system throughout the east. Whatever other rules may be approved or rejected, I am sure that No. 44, which I inserted, will remain. It is this: "No consul shall recognize the claim of any American citizen arising out of a violation of the provisions of the act of Congress, approved February 17, 1862, relating to the 'coolie trade,' so called, nor any claim which involves the holding any person in slavery." I send also the circular of Mr. Seward, (marked A.) I also enclose the decrees as printed.

I have the honor to be, sir, your obedient servant,

ANSON BURLINGAME.

Hon. WILLIAM H. SEWARD,

Secretary of State.

Shanghai, November 1, 1864.

I have been directed by his excellency the honorable Anson Burlingame. United States minister plenipotentiary and envoy extraordinary to China, to publish the following decrees of 22d and 23d April last. Under the provisions of the act of Congress they become of binding force and effect from this date. Certified copies of the decrees have gone forward for simultaneous publication at the several ports.

GEO. F. SEWARD, *Consul General.*

* * * * * * *

(Regulation of April 22, 1864, referred to above, provides for enrollment of American residents at consulates. The consular court regulations, dated April 23, which follow in the report, are set out in part below.)

* * * * * * *

Regulations for the consular courts of the United States of America in China.

In pursuance of section 5 of the act of Congress, approved June 22, 1860, entitled "An act to carry into effect certain provisions in the treaties between the United States, China, Japan, Siam, Persia, and other countries, giving certain judicial powers to ministers and consuls, or other functionaries of the United States in those countries, or for other purposes," I, Anson Burlingame, minister plenipotentiary and envoy extraordinary of the United States to the empire of China, do hereby decree the following rules and regulations for the guidance of the consular courts in China:

* * * * * * *

XV.—Limitation of Actions and Prosecutions.

82. *Criminal.*—Heinous offenses not capital must be prosecuted within six years; minor offenses within one.

83. *Civil.*—Civil actions, based on written promise, contract, or instrument, must be commenced within six years after the cause of action accrues; others within two.

84. *Absence; fraudulent concealment.*—In prosecutions for heinous offences not capital, and in civil cases involving more than $500, any absence of respondent or defendant for more than three months at a time from China shall be added to the limitation; and in civil cases involv-

ing more than $100, the period during which the cause of action may be fraudulently concealed by defendant shall likewise be added.

*   *   *   *   *   *   *

XVIII.—Proviso.

106. All decrees heretofore issued by authority of the commissioners and ministers of the United States to China, which are inconsistent in whole or in part with the provisions of this decree, are hereby annulled, and those portions are henceforth void and of no effect; and the promulgation of these rules abrogates no authority hitherto lawfully exercised by consuls in China not inconsistent herewith.

Anson Burlingame.

Legation of the United States to China,
Peking, April 23, 1864.

Assented to:
Peking, April 23, 1864.
Geo. F. Seward,
Consul General.

Assented to:
Canton, July 12, 1864.
Oliver H. Perry,
U. S. Consul.

Assented to:
Swatow, September 3, 1864.
J. C. A. Wingate,
U. S. Consul.

Assented to:
Amoy, August 30, 1864.
Oliver B. Bradford,
U. S. Vice-consul.

Assented to:
Foo-Chow-Foo, 1864.
A. L. Clarke,
U. S. Vice-consul.

Assented to:
Ningpo, June 20, 1864.
Edward C. Lord,
U. S. Vice-consul.

Assented to:
Hankow, June 11, 1864.
Wm. Breck,
U. S. Consul.

Assented to: H. G. Bridges,
Kiukiang, June 13, 1864. *U. S. Vice-consul.*

Assented to: S. W. Pomeroy, Jr.,
Tientsin, April 27, 1864. *U. S. Vice-consul.*

Assented to: G. H. Colton Salter,
Chinkiang, June 2, 1864. *Acting U. S. Consul.*

* * * * * * *

Mr. Seward to Mr. Burlingame.

No. 121.)

Department of State

Washington, March 27, 1865.

Sir: Your despatch of the 10th of November, 1864, and its accompaniments, relative to the regulations by which you propose to conduct the proceedings in the consular courts of China, has been received. The subject will be submitted to Congress at its next session for consideration.

I am, sir, your obedient servant,

William H. Seward.

Anson Burlingame, Esq., &c., &c., &c.

C. THE PROVISIONS OF THE CONSULAR COURT ACT OF 1860 AS INCORPORATED IN THE REVISED STATUTES OF 1878.

Revised Statutes of the United States (2d ed., 1878):

Sec. 4083. To carry into full effect the provisions of the treaties of the United States with China, Japan, Siam, Egypt, and Madagascar, respectively, the minister and the consuls of the United States, duly appointed to reside in each of those countries, shall, in addition to other powers and duties imposed upon them, respectively, by the provisions of such treaties, respectively, be invested with the judicial authority herein described, which shall appertain to the office of minister and consul, and be a part of the duties belonging thereto, wherein, and so far as, the same is allowed by treaty.

(Sections 4084 and 4085 correspond to Sections 2 and 3 of the Act of 1860, giving, respectively, criminal and civil jurisdiction.)

* * * * * * *

Sec. 4086. Jurisdiction in both criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others to the extent that the terms of the treaties, respectively, justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law

of equity and admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the common law, nor the law of equity or admiralty nor the statutes of the United States, furnish appropriate and sufficient remedies, the ministers in those countries, respectively, shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies.

Sec. 4117. In order to organize and carry into effect the system of jurisprudence demanded by such treaties, respectively, the ministers, with the advice of the several consuls in each of the countries, respectively, or of so many of them as can be conveniently assembled, shall prescribe the forms of all processes to be issued by any of the consuls; the mode of executing and the time of returning the same; the manner in which trials shall be conducted, and how the records thereof shall be kept; the form of oaths for Christian witnesses, and the mode of examining all other witnesses; the costs to be allowed to the prevailing party, and the fees to be paid for judicial services; the manner in which all officers and agents to execute process, and to carry this title into effect, shall be appointed and compensated; the form of bail bonds, and the security which shall be required of the party who appeals from the decision of a consul; and shall make all such further decrees and regulations from time to time, under the provisions of this chapter, as the exigency may demand.

Sec. 4118. All such regulations, decrees, and orders shall be plainly drawn up in writing, and submitted, as hereinbefore provided, for the advice of the consuls, or

as many of them as can be consulted without prejudicial delay or inconvenience, and such consul shall signify his assent or dissent in writing, with his name subscribed thereto. After taking such advice, and considering the same, the minister in each of those countries may, nevertheless, by causing the decree, order, or regulation to be published with his signature thereto, and the opinions of his advisers inscribed thereon, make it binding and obligatory, until annulled or modified by Congress; and it shall take effect from the publication or any subsequent day thereto named in the act.

Sec. 4119. All such regulations, orders, and decrees shall, as speedily as may be after publication, be transmitted by the ministers, with the opinions of their advisers, as drawn up by them severally, to the Secretary of State, to be laid before Congress for revision.

D. THE ACT OF 1906 CREATING THE UNITED STATES COURT FOR CHINA AND PROVIDING THAT ITS PROCEDURE SHALL BE IN ACCORDANCE WITH THAT PREVIOUSLY PRESCRIBED FOR THE CONSULAR COURTS.

Act of Congress of June 30, 1906, Chap. 3934, 34 Stat. 814:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That a court is hereby established, to be called the United States court for China, which shall have exclusive jurisdiction in all cases and judicial proceedings whereof jurisdiction may now be exercised by United States consuls and ministers by law and by virtue of treaties between the United States and China, except in so far as the said jurisdiction is qualified by section two of this Act.

* * * * * * *

Sec. 2. The consuls of the United States in the cities of China to which they are respectively accredited shall have the same jurisdiction as they now possess in civil cases where the sum or value of the property involved in the controversy does not exceed five hundred dollars United States money and in criminal cases where the punishment for the offense charged can not exceed by law one hundred dollars fine or sixty days' imprisonment, or both, and shall have power to arrest, examine, and discharge accused persons or commit them to the said court. From all final judgments of the consular court either party shall have the right of appeal to the United States court for China.

* * * * * * *

Sec. 3. That appeals shall lie from all final judgments or decrees of said court to the United States circuit court of appeals of the ninth judicial circuit, and thence appeals and writs of error may be taken from the judgments or decrees of the said circuit court of appeals to the Supreme Court of the United States in the same class of cases as those in which appeals and writs of error are permitted to judgments of said court of appeals in cases coming from district and circuit courts of the United States. Said appeals or writs of error shall be regulated by the procedure governing appeals within the United States from the district courts to the circuit courts of appeal, and from the circuit courts of appeal to the Supreme Court of the United States, respectively, so far as the same shall be applicable; and said courts are hereby empowered to hear and determine appeals and writs of error so taken.

Sec. 4. The jurisdiction of said United States court, both original and on appeal, in civil and criminal matters, and also the jurisdiction of the consular courts in China, shall in all cases be exercised in conformity with said treaties and the laws of the United States now in force in reference to the American consular courts in China, and all judgments and decisions of said consular courts, and all decisions, judgments, and decrees of said United States court, shall be enforced in accordance with said treaties and laws. But in all such cases when such laws are deficient in the provisions necessary to give jurisdiction or to furnish suitable remedies, the common law and the law as established by the decisions of the courts of the United States shall be applied by said court in its deci-

sions and shall govern the same subject to the terms of any treaties between the United States and China.

Sec. 5. That the procedure of the said court shall be in accordance, so far as practicable, with the existing procedure prescribed for consular courts in China in accordance with the Revised Statutes of the United States: *Provided, however,* That the judge of the said United States court for China shall have authority from time to time to modify and supplement said rules of procedure. The provisions of sections forty-one hundred and six and forty-one hundred and seven of the Revised Statutes of the United States allowing consuls in certain cases to summon associates shall have no application to said court.

E. THE UNITED STATES CODE OF 1926, RE-ENACTING PROVISIONS OF THE ACTS OF 1860 AND 1906.

The Code of the Laws of the United States of America, in force Dec. 7, 1925, adopted June 30, 1926, Chap. 712.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the fifty titles hereinafter set forth are intended to embrace the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925, compiled into a single volume under the authority of Congress, and designated "The Code of the Laws of the United States of America."

Sec. 2. In all courts, tribunals, and public offices of the United States, at home or abroad, of the District of Columbia, and of each state, Territory, or insular possession of the United States—

(a) The matter set forth in the Code, evidenced as hereinafter in this section provided, shall establish prima facie the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925; but nothing in this Act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments.

Title 22.—Foreign Relations and Intercourse.

Chapter 2.—Consular Courts.

(Reference is made to Sections 141, 142, 143, 145, 146, 147 and 148 of this Chapter. These sections are not reprinted here because their provisions are in all material respects identical with those of the Act of June 22, 1860 and of the Revised Statutes of 1878, which have been quoted above.)

Chapter 3.—United States Court for China.

(Reference is made to Sections 191 to 196 of this Chapter. They contain provisions substantially identical with those of sections 1-5 of the Act of June 30, 1906, quoted above. The only code section which throws any additional light on the questions involved in this case is Section 196, which corresponds with Section 5 of the statute, and is quoted below.)

196. *Procedure generally; exclusion of associate aids.*—The procedure of the United States court for China shall be in accordance, so far as practicable, with the procedure prescribed for consular courts in China in accordance with chapter 2 of this title: *Provided, however,* That the judge of the said United States court for China shall have authority from time to time to modify and supplement said rules of procedure. The provisions of sections 152 and 153 of chapter 2 of this title allowing consuls in certain cases to summon associates shall have no application to said court.

F. ACT OF 1900, PROVIDING CIVIL GOVERNMENT FOR ALASKA.

Act of Congress of June 6, 1900, Chap. 786, 31 Stat. 321, 334, entitled, "An Act Making further provision for a civil government for Alaska. * * *":

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I.

Chapter One.

Sec. 1. That the territory ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, and known as Alaska, shall constitute a civil and judicial district, the government of which shall be organized and administered as hereinafter provided. * * *

TITLE II.

*   *   *   *   *   *   *

Chapter Two.

*   *   *   *   *   *   *

Sec. 3. Civil actions shall only be commenced within the periods prescribed in this title after the cause of action shall have accrued. * * *

Sec. 4. The periods prescribed in section three of this Act for the commencement of actions shall be as follows: * * *

Sec. 5. Within ten years—

First. An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States;

Second. An action upon a sealed instrument.

Sec. 6. Within six years—

First. An action upon a contract or liability, express or implied, excepting those mentioned in section five; * * *

(Secs. 835-838 of Compiled Laws of the Territory of Alaska, 1913, pages 379-381, are in substance identical with the above provisions, of which they are a codification.)

G. DISTRICT OF COLUMBIA CODE.

Act of Congress of Mar. 3, 1901, Chap. 854, 31 Stat. 1189, 1389, entitled, "An Act To establish a code of law for the District of Columbia."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following is hereby enacted and declared to be a code of law for the District of Columbia, to go into effect and operation from and after the first day of January, in the year of our Lord nineteen hundred and two.

* * * * * * *

Chapter Forty-One.

Limitation of Actions.

Sec. 1265. Periods of Limitations—No action shall be brought for the recovery of lands, tenements, or hereditaments after fifteen years from the time the right to maintain such action shall have accrued; nor on any executor's or administrator's bond after five years from the time of the right of action accrued thereon; nor on any other bond or single bill, covenant or other instrument under seal after twelve years after the accruing of the cause of action thereon; nor upon any simple contract, express or implied, or for the recovery of damages for any injury to real or personal property, or for the recovery of personal property or damages for its unlawful detention after three years from the time when the right to maintain any such action shall have accrued; * * *.

(The provisions of Sec. 1265, above quoted, have been incorporated without change in the District of Columbia Code of 1930, Title 24, Sec. 341.)

* * * * * * *

United States Circuit Court of Appeals
Ninth Circuit

Appeal from
United States Court for China

WALTER CHALAIRE,
Appellant

v

No. 7753

CORNELL S. FRANKLIN,
Appellee

PETITION OF APPELLEE FOR REHEARING AND, IN DUE COURSE, FOR AFFIRMANCE OR NEW TRIAL

BRIEF IN SUPPORT

CONSULAR REGULATIONS, CHINA, 1864 (Photostat)

Attorneys for Appellee: Frank E. Hinckley and W. H. Lawrence, both of San Francisco, California
Of Counsel: Franklin & Harrington, Shanghai, China

FILED
FEB 11 1936
PAUL P. O'BRIEN

PERNAU-WALSH PRINTING COMPANY, SAN FRANCISCO

United States Circuit Court of Appeals
Ninth Circuit

Appeal from
United States Court for China

WALTER CHALAIRE,
Appellant

v

No. 7753

CORNELL S. FRANKLIN,
Appellee

PETITION OF APPELLEE FOR REHEARING AND, IN DUE COURSE, FOR AFFIRMANCE OR NEW TRIAL

As grounds for rehearing and, in due course, for affirmance or new trial we respectfully present:

1 Appellate opinion omits to consider Section 4 of the Organic Act of the United States Court for China, 1906, which, in language used in the successive statutes from 1848 forward providing for extraterritorial jurisdiction, provides, by reference, for certain court procedure, that is for court procedure prescribed by Act of Congress, including, if taken as

procedural, *statute* of limitations, which no inclusion in Consular Regulations, China, 1864, could supersede and which it would seem improbable to any one mindful of the original cause for a *statute* of limitations and its universality in English and our own jurisprudence that any Judge, Consular or higher, would presume to replace with rule of court;

Also as ground, the patent error in appellate opinion of using *Wulfsohn v Russo-Asiatic Bank* as case authority on statute of limitations, whereas that case expressly disclaims itself to be authority on that point, the point not being before the appellate court for review; nor does that case show, as our case does, whether or not any issue existed as to which was applicable, Consular Regulations, Section 83, or one of the laws of the United States as provided in the Organic Act, Section 4;

On these two grounds we respectfully petition for rehearing and, in due course, with opportunity to each party on appeal to submit brief, we petition that there be substituted for the present appellate judgment of directed judgment in trial court the final appellate judgment of affirmance.

2 Or, should the foregoing petition be denied, we request consideration of the extraordinary situation that complainant below amended complaint by eliminating matters not in written contract, evidently apprehending the statute of limitations; that defendant

imperfectly pleaded, unless as to the statute; that the trial court in opinion dealt only with the statute and only on that basis gave judgment; and that by this fortuity of pleading and omission to adjudge except upon application of the statute, the full and true issue cannot be discerned from the transcript of record. This controversy, or we may say, difference, between members of the bar in China, was of a professional nature. The active practitioners before the court are few more than a handful and their standing before an international metropolitan community is to be well maintained. The matter could very properly have been negotiated or arbitrated. Above all it is clear that the issue was specially and intimately within the province of the extraterritorial trial court. On new trial,—and the appellate judgment left as it is will certainly necessitate some measure of new adjudication,—even with appellate opinion remaining as it is, the true issues could be given improved pleading, with probability of final disposition in trial court. We petition, alternatively, that there be substituted for directed judgment a judgment of new trial.

There follow: Brief in Support; also, as judicially noticeable, Consular Regulations, China, 1864 (Photostat).

Respectfully submitted,

Frank E. Hinckley

W. H. Lawrence

Attorneys for Appellee

We hereby certify that in our opinion the foregoing petition is well founded in law and that it is not interposed for delay.

February 10, 1936

FRANK E. HINCKLEY
W. H. LAWRENCE
Attorneys for Appellee

United States Circuit Court of Appeals
Ninth Circuit

Appeal from
United States Court for China

Walter Chalaire,

Appellant

v

No. 7753

Cornell S. Franklin,

Appellee

BRIEF IN SUPPORT OF PETITION OF APPELLEE FOR REHEARING AND, IN DUE COURSE, FOR AFFIRMANCE OR NEW TRIAL

POINTS OF ARGUMENT

1 Limitations of actions are by statute; a consular regulation is not a statute; the Judge of the United States Court for China, unlike judges generally, is empowered to apply, in absence of specific statute, a United States statute that he adjudges necessary and suitable for United States jurisdiction in China.

2 In the present appellate opinion sole reliance for limitation of action is upon a consular regulation invalid *ab initio* and never lawfully in force.

3 As one of the "laws of the United States", or, as the same Act of Congress containing these words next reads, a "statute", which the judge, in a case before him for adjudication, has power to adjudge suitable and to apply, is the District of Columbia code section on period of limitation of action on simple contract.

4 The special defenses, other than that of limitation, not having been passed upon in first instance, the mandate of the appellate court in case of reversal should be for new trial rather than for entry of a directed judgment.

5 Associate counsel at Shanghai bring to attention the following:

Right and early appellate determination of the present issue is, for the China jurisdiction, a most serious public necessity. If the present appellate judgment stands, many judgments of the United States Court for China are in error and voidable.

COMMENT ON POINTS OF ARGUMENT

1 Limitations of actions on contract are by statute, not otherwise. Whether such a statute is or is not procedural matters nothing.

A consular regulation is not a statute.

The Minister and Consuls could have no power to make a statute.

The Congress has, however, conferred upon the Judge of the United States Court for China power to adjudge necessary and suitable and, in pursuance of such adjudication, to apply laws of the United States additional to those which are specifically applicable.

We question whether this special judicial power, properly exercised, is subject to review. This power was not questioned in *Biddle v United States.*

To review a proper exercise of this power would be destructive of a very important judicial discretion in trial court. And there is not to be found in the extraterritorial jurisdiction statutes any provision for appellate jurisdiction to determine what, in the language of the statutes, is necessary, suitable, practicable, in conformity with treaties as locally and daily operative under direction of the Executive.

The power is distinct from authority to make procedural rules. Such rules would result from experience of administration of the offices of the court; also from course of adjudications. But the power

to apply one or another certain statute is distinctly a judicial power. To some extent all judges of higher courts at home have power of this nature, particularly those that have to apply the principles of conflicts of laws. How can it be strange or unreasonable that an extraterritorial court be empowered in larger measure as an aid to the Executive in fulfilling the obligations of the treaties?

Where else than in court when a specific question is presented would a judge disciplined in the principles of our law so normally and considerately exercise that special power? Would it be tolerable that an extraterritorial judge,—or would any such judge have the temerity,—announce in advance that he would apply such and such listed "laws of the United States"?

2 Consular Regulations, Section 83, never was lawfully in force, because, even if the Minister and Consuls in China had legislative power, they did not, with respect to this section, exercise the power in accordance with law. The enabling Act was that of June 22, 1860, particularly Section 5. (This section was reenacted with some minima of change as Revised Statutes, Section 4117; and again as 22 United States Code, Section 146.) Reference to the text of the enabling Act is requested.

The Act enumerates the authorized subjects of consular regulations. The statute of limitations is not so enumerated.

3 Objection has been urged that a provision in the District of Columbia Code, such as that on limitation of actions, could not, with good reason, be held to be one of the laws of the United States applicable in China.

It will be noted that in Section 4 of the Act of Congress of June 22, 1860, Revised Statutes, Section 4086, relating to jurisdiction of extraterritorial courts, the expression "laws of the United States" is used interchangeably with the expression "statutes of the United States".

It is only when these "laws", "statutes", are not adapted to the object or are deficient in the provisions necessary to furnish suitable remedies that the common law, equity, admiralty, and the decrees and regulations shall be resorted to.

The principle of *Biddle v United States (C C A 9, 1907) 156 F 759,* essential to decision of that case, was that an enactment by Congress for a jurisdiction in which its legislative authority was exclusive, such as providing that obtaining money on false pretenses was a criminal offense, was such an expression of the will of Congress that it could be adjudged in China to be a law of the United States necessary and suitable to be applied there.

Of jurisdictions within which the legislative authority of Congress has been at some time exclusive there have been many. The territories were such. One by one, including Alaska, they were accorded by Congress some or full measure of legislative autonomy.

The District of Columbia remains exclusively controlled in legislation by Congress. Some of its laws, of course, are unsuitable in China. Most of its more general laws are suitable.

4 The trial court, having sustained the plea of the statute of limitations, had no need to pass upon the sufficiency of other defenses pleaded in the answer, and in fact did not consider such other defenses, as appears by the opinion of the court.

It is true, as the appellate court points out, that the answer admits most of the allegations of the complaint, and particularly the authenticity of the letter of February 10, 1927. But it is entirely possible that, notwithstanding the facts so admitted, there was no obligation to pay the sum demanded, either because of failure of consideration or because of absence of consideration or because of subsequent modification of the terms of the letter. On the face of the letter of February 10, the consideration is none too clear; Mr Chalaire binds himself to nothing; he is to have 60% of Mr Franklin's net earnings so long as he remains on vacation and until he has received 50,000 taels, but he does not bind himself to stay away from China.

It must be evident that defendant did not intend to concede that, even regardless of the statute of limitations, he had incurred the obligation. Perhaps his pleading is less than perfect; the circumstance that all the facts were familiar to plaintiff may have made the pleader careless. But it is peculiarly the function

of the trial court to pass upon the sufficiency, in matter of form, of pleadings. A motion for judgment on the pleadings can not serve as a special demurrer.

We submit that it will be not only proper, but may prevent a miscarriage of justice, to return the case to the trial court to be tried upon the issues, if any, other than that of limitation, and after such amendment of pleadings as the trial court, in its discretion, shall allow.

5 Associate counsel at Shanghai bring to attention the following:

Right and early appellate determination of the present issue is, for the China jurisdiction, a most serious public necessity.

Criminal prosecutions are in course in which the informations are laid under provisions of the District of Columbia Code.

Commercial law is taken by the American community in China to be that of the District of Columbia.

If the present appellate judgment stands, many judgments of the United States Court for China are in error and voidable.

For many years publication of summons has been in accord with suitable law of the District of Columbia.

Jurisdiction of divorce has attached and cause for divorce been pleaded on basis of the District of Columbia Code; and numerous divorce decrees have been made.

Statement in the appellate opinion that Consular Regulations, Sec. 83 (limitation of actions) was recognized and applied in *Wulfsohn v Russo-Asiatic Bank* occasions reference to that case at point where the opinion reads:

> ". . . the statute of limitations was not pleaded in any form to the cause of action set forth in the amended petition. In the absence of such a plea there is nothing before us for review."

Nor was there any challenge whatsoever in *Wulfsohn v Russo-Asiatic Bank* as to which statute was the statute of limitations.

Omission of expressed appellate opinion as to bearing or not of *Biddle v United States* has brought serious doubts as to limits of the value of that decision.

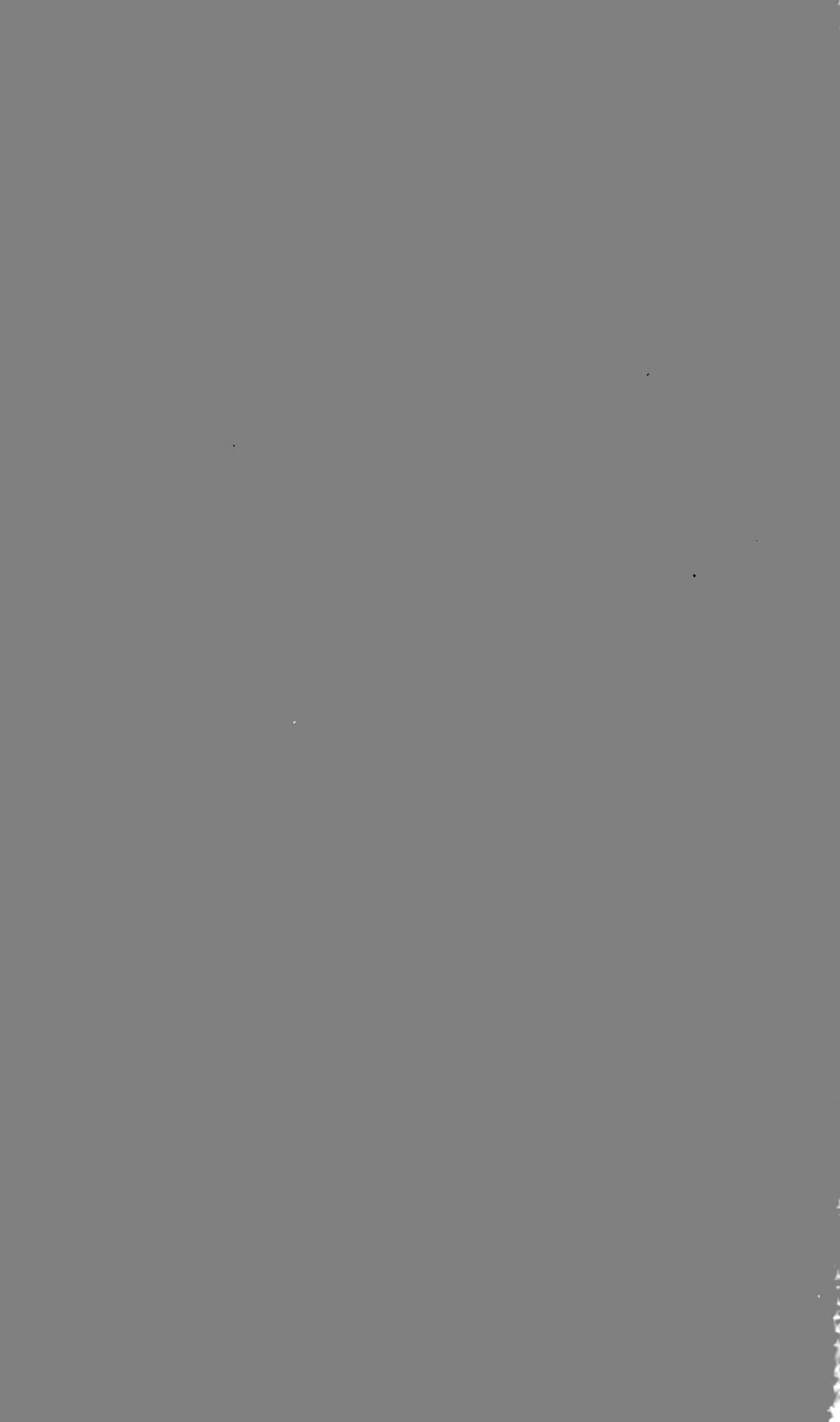
The responsibility of the Circuit Court of Appeals in this matter is the more onerous because review of its decision by the Supreme Court of the United States could probably take only the usual course of petition to grant certiorari.

For the foregoing reasons the petition of appellee is for affirmance; alternatively for new trial.

February 10, 1936

Respectfully submitted,
FRANK E. HINCKLEY
W. H. LAWRENCE
Attorneys for Appellee

(Note: Appended photostat of Consular Regulations, China, 1864, is from Ho. Ex. Doc. Vol. I, No. 1, Part 2, 39th Cong., 1st Sess., 1866, p. 413-421. These continue in effect Consular Regulations made at earlier date and not inconsistent therewith.)



Mr. Burlingame to Mr. Seward.

No. 94.] LEGATION OF THE UNITED STATES,
Peking, November 9, 1864.

SIR: I have the honor to send two decrees made by me, and approved by the consuls, in pursuance of the act of Congress approved June 22, 1860.

The *first* was rendered necessary by the irregularities of lawless men in connexion with the Chinese rebellion; the *second* by the act of Congress aforesaid.

It will be observed that the *second* decree is largely taken from forms made by the United States consul general at Constantinople, which have already been submitted by you to Congress. With our minister, the Hon. E. Joy Morris, I wish to bear witness to the ability of Mr. Godard in this respect, and to beg that the credit ascribed to these rules may be transferred to him. I wish also to express my thanks to George F. Seward, esq., consul general at Shanghai,

for many valuable practical suggestions. I am chiefly indebted to him for the fee bill. He came to Peking at my request to consult in relation to these decrees.

I have carefully compared these rules with those "framed for the supreme consular court, and other consular courts, in the dominions of the Sublime Ottoman Porte, under the order of her Majesty in council of the 27th day of August, 1860, by the judge of her Majesty's supreme consular court, and approved by one of her Majesty's principal secretaries of state;" and while I find them covering the same ground, I think those of Mr. Godard are less elaborate and more practical. Their adoption, as far as possible, in the very language of Mr. Godard, is a great advantage. They need but to be adopted in Japan to secure a uniform system throughout the east. Whatever other rules may be approved or rejected, I am sure that No. 44, which I inserted, will remain. It is this: "No consul shall recognize the claim of any American citizen arising out of a violation of the provisions of the act of Congress, approved February 17, 1862, relating to the 'coolie trade,' so called, nor any claim which involves the holding any person in slavery." I send also the circular of Mr. Seward, (marked A.) I also enclose the decrees as printed.

I have the honor to be, sir, your obedient servant,

ANSON BURLINGAME.

Hon. WILLIAM H. SEWARD,
Secretary of State.

SHANGHAI, *November* 1, 1864.

I have been directed by his excellency the honorable Anson Burlingame, United States minister plenipotentiary and envoy extraordinary to China, to publish the following decrees of 22d and 23d April last. Under the provisions of the act of Congress they become of binding force and effect from this date. Certified copies of the decrees have gone forward for simultaneous publication at the several ports.

GEO. F. SEWARD, *Consul General.*

Regulations for the consular courts of the United States of America in China.

In pursuance of section 5 of the act of Congress, approved June 22, 1860, entitled "An act to carry into effect certain provisions in the treaties between the United States, China, Japan, Siam, Persia, and other countries, giving certain judicial powers to ministers and consuls, or other functionaries of the United States in those countries, or for other purposes," I, Anson Burlingame, minister plenipotentiary and envoy extraordinary of the United States to the empire of China, do hereby decree the following rules and regulations, which shall have the force of law in the consular courts of China:

1. Every citizen of the United States residing within the limits of the ports open to foreign trade in the dominions of the Emperor of China is required to be enrolled in the consular register, and shall apply in person at the consulate within thirty days after the publication of this decree. Every American citizen who may arrive within the limits of the port, save and except any one who may be borne on the muster-roll of an American vessel, shall apply within ten days at the consulate to be enrolled. Any American citizen neglecting to be so enrolled will not be entitled to claim the protection or intervention of the authorities, unless he can furnish a valid reason for not so doing.

2. In all cases where an applicant to be enrolled cannot furnish a passport or other legal proof of his citizenship, he shall make oath that he is a citizen of the United States; and if the consul deem desirable, be required to bring such further evidence as he shall consider satisfactory.

ANSON BURLINGAME.

LEGATION OF THE UNITED STATES,
Peking, April 22, 1864.

Assented to:
PEKING, *April* 22, 1864.
GEO. F. SEWARD, *Consul General.*

Assented to:
CANTON *July*, 12, 1864.
OLIVER H. PERRY, *U. S. Consul.*

Assented to:
SWATOW, *September* 3, 1864.
J. C. A. WINGATE, *U. S. Consul.*

Assented to;
AMOY, *August* 30, 1864.
OLIVER B. BRADFORD, *U. S. Vice-consul,*

Assented to:
FOO-CHOW-FOO, 1864.
A. L. CLARKE, *U. S. Vice-consul.*

Assented to:
NINGPO, *June* 20, 1864.
EDWARD C. LORD, *U. S. Vice-consul.*

Assented to:
HANKOW, *June* 11, 1864.
WM. BRECK, *U. S. Consul.*

Assented to:
KINKIANG, *June* 13, 1864.
H. G. BRIDGES, *U. S. Vice-consul.*

Assented to:
CHINKIANG, *June* 2, 1864.
G. H. COLTON SALTER, *Acting U. S. Consul.*

Assented to:
TIENTSIN, *April* 27, 1864.
S. W. POMEROY, JR., *U. S. Vice-consul.*

Regulations for the consular courts of the United States of America in China.

In pursuance of section 5 of the act of Congress, approved June 22, 1860, entitled "An act to carry into effect certain provisions in the treaties between the United States, China, Japan, Siam, Persia, and other countries, giving certain judicial powers to ministers and consuls, or other functionaries of the United States in those countries, or for other purposes," I, Anson Burlingame, minister plenipotentiary and envoy extraordinary of the United States to the empire of China, do hereby decree the following rules and regulations for the guidance of the consular courts in China:

I.—ORDINARY CIVIL PROCEEDINGS.

1. *How commenced.*—Civil proceedings between American citizens must commence by written petition verified by oath before the consul.
2. *Three classes of action.*—Ordinary personal civil actions are of three classes, viz: contract, comprising all cases of contract or debt; wrong, when damages are claimed for a wrong; replevin, when possession of a specified article is claimed.
3. *Demand necessary in contract and replevin.*—In contract, the petition must aver that payment, or a performance of the conditions of the contract has been demanded and withheld; and, in replevin, that the articles to be replevied have been demanded.
4. *Petitioner must deposit money.*—The petitioner shall be required to deposit a reasonable sum to defray the probable expenses of court and defendant's costs; subsequent deposits may be required, if found necessary.
5. *Notice to defendant.*—Upon deposit of the money, the consul shall order notice on the petition, in writing, directing defendant to appear before the court at a given day and hour to file his written answer on oath.
6. *Service.*—Notice must be served on each defendant at least five days before return day, by delivery of an attested copy of the petition and order, and of any accompanying account or paper.
7. Personal service should always be required when practicable.
8. *Default.*—On proof of due notice, judgment by default shall be procured against any defendant failing to appear and file his answer as required; but the default may be taken off for good cause within one day after, exclusive of Sunday.

9. *Damages.*—But in actions of wrong, and all others where the damages are in their nature unliquidated and indefinite, so that they cannot be calculated with precision from the statement of the petition, the amount of the judgment shall be ascertained by evidence, notwithstanding the default.

10. *Answer.*—If defendant appears and answers, the consul, having both parties before him, shall, before proceeding further, encourage a settlement by mutual agreement, or by submission of the case to referees agreed on by the parties, a majority of whom shall decide it.

11. *Amendments.*—Parties should, at the trial, be confined as closely as may be to the averments and denials of the statement and answer, which shall not be altered after filing except by leave granted in open court.

12. *American witnesses compelled to attend.*—On application of either party and advance of the fees, the counsel shall compel the attendance of any witness within his jurisdiction before himself, referees, or commissioners.

13. *Parties are witnesses.*—Each party is entitled and may be required to testify.

14. *Decrees to be obeyed.*—Judgment may be given summarily against either party failing to obey any order or decree of the consul.

15. *Attachment and arrest.*—For sufficient cause, and on sufficient security, the consul, on filing a petition, may grant a process of attachment of any defendant's property to a sufficient amount, or of arrest of any defendant not a married woman, nor in the service of the United States under commission from the President.

16. *Dissolution of attachment.*—Defendant may at any time have the attachment dissolved by depositing such sum, or giving such security, as the consul may require.

17. *Sale of perishable property.*—Perishable property, or such as is liable to serious depreciation under attachment, may, on petition of either party, be sold on the consul's order, and its proceeds deposited in the consulate.

18. *Release of debtor.*—Any defendant arrested or imprisoned on civil petition shall be released on tender of a sufficient bond, deposit of a sufficient sum, or assignment of sufficient property.

19. *Debtor's disclosure.*—Any person under civil arrest or imprisonment may have his creditor cited before the consul to hear a disclosure of the prisoner's affairs under oath, and to question thereon; and if the consul shall be satisfied of its truth and thoroughness, and of the honesty of the debtor's conduct towards the creditor, he shall forever discharge him from arrest upon that debt, provided that the prisoner shall offer to transfer and secure to his creditor the property disclosed, or sufficient to pay the debt, at the consul's valuation.

20. *Debtor's board.*—The creditor must advance to the jailer his fees and payment for his prisoner's board until the ensuing Monday, and afterwards weekly, or the debtor will be discharged from imprisonment and future arrest.

21. *Execution.*—On the second day after judgment (exclusive of Sunday) execution may issue, enforcing the same with interest at 12 per cent. a year, against the property and person of the debtor, returnable in thirty days, and renewable.

22. *Seizure and sale of property.*—Sufficient property to satisfy the execution and all expenses may be seized and sold at public auction by the officer after due notice.

23. Property attached on petition, and not advertised for sale within ten days after final judgment, shall be returned to the defendant.

24. *Final judgment for defendant.*—When final judgment is given in favor of defendant, his person and property are at once freed from imprisonment or attachment, and all security given by him discharged. And the consul may, at his discretion, award him compensation for any damage necessarily and directly sustained by reason of such attachment, arrest, or imprisonment.

25. *Offset.*—In actions of contract defendant may offset petitioner's claim by any contract claim, filing his own claim, under oath, with his answer. Petitioner shall be notified to file his answer seasonably, on oath, and the two claims shall then be tried together, and but one judgment given for the difference, if any be proved in favor of either party, otherwise for defendant's costs.

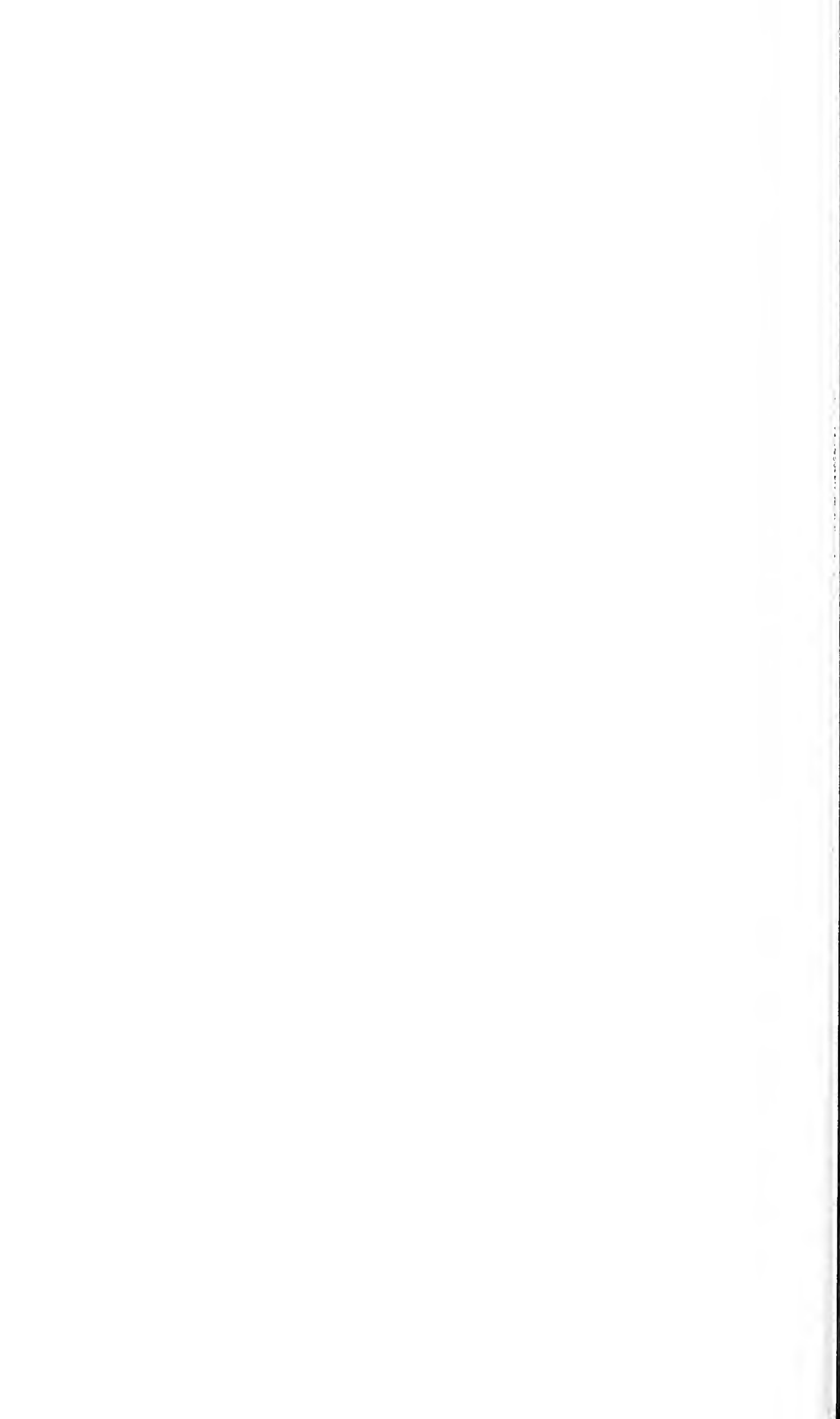
26. *Costs.*—Except, as hereinafter provided, the party finally prevailing recovers costs, to be taxed by him and revised by the consul.

27. *Trustee process.*—In contract the consul may order defendant's property or credits in a third party's hands to be attached on the petition by serving him with due notice as trustee, provided petitioner secures trustee his costs by adequate special deposit.

28. *Trustee's costs.*—If adjudged trustee, the third party may retain his costs from the amount for which he is adjudged trustee if sufficient; otherwise the balance of trustee's costs must be paid out of petitioner's special deposit, as must the whole of his costs if not adjudged trustee.

29. *Demand on trustee upon execution.*—The amount for which a trustee is charged must be inserted in the execution, and demanded of him by the officer within ten days after judgment, or all claim on him ceases. Process against property or person of the trustee may issue ten days after demand.

30. *Debt must be at least ten dollars.*—If petitioner recovers judgment for less than ten dollars, or if less than ten dollars of defendant's property or credits is proved in the third party's hands, in either case the third party must be discharged with costs against petitioner.



31. *Replevin.*—Before granting a writ of replevin the consul shall require petitioner to file a sufficient bond, with two responsible sureties, for double the value of the property to be replevied, one an American citizen, or petitioner may deposit the required amount.

II.—TENDER, ETC.

32. Before a creditor files his petition in contract, his debtor may make an absolute and unconditional offer of the amount he considers due by tendering the money in the sight of the creditor or his legal representative.

33. *Deposit.*—If not accepted, the debtor shall, at his own risk and paying the charges, deposit the money with the consul, who shall receipt to him and notify the creditor.

34. *Demand or withdrawal.*—It shall be paid to the creditor at any time, if demanded, unless previously withdrawn by the depositor.

35. *Costs.*—If the depositor does not withdraw his deposit, and, upon trial, is not adjudged to have owed petitioner at the time of the tender more than its amount, he shall recover all his costs.

36. *Offer to be defaulted.*—At any stage of a suit in contract or wrong, defendant may file an offer to be defaulted for a specific sum and the costs up to that time; and if petitioner chooses to proceed to trial, and does not recover more than the sum offered and interest, he shall pay all defendant's costs arising after the offer, execution issuing for the balance only.

III.—REFERENCE.

37. When parties agree to a reference, they shall immediately file a rule, and the case be marked "referred;" a commission shall then issue to the referees, with a copy of all papers filed in the case.

38. *Award and acceptance.*—The referees shall report their award to the consul, who shall accept the same and give judgment and issue execution thereon, unless satisfied of fraud, perjury, corruption, or gross error in the proceedings.

39. *When transmitted to minister.*—In cases involving more than five hundred dollars, if his acceptance is withheld, the consul shall at once transmit the whole case, with a brief statement of his reasons, and the evidence therefor, to the minister, who shall give his judgment on the award, or grant a new trial before the consul.

IV.—APPEAL.

40. *Must be within one day.*—Appeals must be claimed before three o'clock in the afternoon of the day after judgment, (excluding Sunday;) but in civil cases, only upon sufficient security.

41. *To be perfected within five days.*—Within five days after judgment the appellant must set forth his reasons by petition filed with the consul, which shall be transmitted as soon as may be to the minister, with a copy of docket entries and of all papers in the case.

V.—NEW TRIAL.

42. *Because of perjury.*—On proof of the perjury of any important witness of the prevailing party upon a material point affecting the decision of a suit, the consul who tried it may, within a year after final judgment, grant a new trial on such terms as he may deem just.

43. *Generally.*—Within one year after final judgment in any suit not involving more than five hundred dollars, the consul who tried it, or his successor, may, upon sufficient security, grant a new trial where justice manifestly requires it; if exceeding five hundred dollars, with the concurrence of the minister.

VI.—HABEAS CORPUS.

44. *Slaves not to be held.*—No consul shall recognize the claim of any American citizen arising out of a violation of the provisions of the act of Congress approved February 19, 1862, relating to the "coolie trade," so called, nor any claim which involves the holding any person in slavery.

45. *Habeas corpus.*—Upon application of any person in writing and under oath, representing that he or any other person is enslaved, unlawfully imprisoned, or deprived of his liberty by any American citizen within the jurisdiction of a consul, such consul may issue his writ of *habeas corpus*, directing such citizen to bring said person, if in his custody or under his control, before him, and the question shall be determined summarily, subject to appeal.

VII.—DIVORCE.

46. Libels for divorce must be signed and sworn to before the consul, and on the trial each party may testify.

47. *Attachment.*—The consul, for good cause, may order the attachment of libeller's property to such an amount and on such terms as he may think proper.

48. *Husband to advance money.*—He may also, at his discretion, order the husband to advance his wife, or pay into court, a reasonable sum to enable her to prosecute or defend the libel, with a reasonable monthly allowance for her support pending the proceedings.
49. *Alimony.*—Alimony may be awarded or denied the wife on her divorce, at his discretion
50. Custody of the minor children may be decreed to such party as justice and the children's good may require.
51. *Release of both.*—Divorce releases both parties, and they shall not be re-married to each other.
52. *Costs.*—Costs are at the discretion of the consul.

VIII.—MARRIAGE.

53. *Record and return.*—Each consul shall record all marriages solemnized by him or in his official presence.

IX.—BIRTHS AND DEATHS.

54. The birth and death of every American citizen within the limits of his jurisdiction shall likewise be recorded.

X.—BANKRUPTCY, PARTNERSHIP, PROBATE, ETC.

55. Until promulgation of further regulations, consuls will continue to exercise their former lawful jurisdiction and authority in bankruptcy, partnerships, probate of wills, administration of estates and other matters of equity, admiralty, ecclesiastical and common law, not specially provided for in previous decrees, according to such reasonable rules not repugnant to the Constitution, treaties, and laws of the United States, as they may find necessary or convenient to adopt.

XI.—SEAMEN.

56. In proceedings and prosecutions instituted by or against American seamen, the consul may, at his discretion, suspend any of these rules in favor of the seamen when, in his opinion, justice, humanity and public policy require it.

XII.—CRIMINAL PROCEEDINGS.

57. *How commenced.*—Complaints and informations against American citizens should always be signed and sworn to before the consul when the complainant or informant is at or near the consul's port.
58. *How authenticated.*—All complaints and informations not so signed and sworn to by a citizen of the United States, and all complaints and informations in capital cases, must be authenticated by the consul's certificate of his knowledge or belief of the substantial truth of enough of the complaint or information to justify the arrest of the party charged.
59. *Copy of accusation.*—No citizen shall be arraigned for trial until the offence charged is distinctly made known to him by the consul in respondent's own language. In cases of magnitude, and in all cases when demanded, an attested copy (or translation) of the complaint, information, or statement, authenticated by the consul, shall be furnished to him in his own language, as soon as may be after his arrest.
60. *Presence of accuser.*—The personal presence of the accuser is indispensable throughout the trial.
61. *May testify.*—He shall be informed of his right to testify and cautioned that if he chooses to offer himself as a witness, he must answer all questions that may be propounded by the consul or his order, like any other witness.
62. *American witnesses compelled to attend.*—The government and the accused are equally entitled to compulsory process for witnesses within their jurisdiction; and if the consul believes the accused to be unable to advance the fees, his necessary witnesses shall be summoned at the expense of the United States.
63. *Fine and cost.*—When punishment is by fine, costs may be included or remitted at the consul's discretion. An alternative sentence of thirty days' imprisonment shall take effect on non-payment of any part of the fine or costs adjudged in any criminal proceeding.
64. Any prisoner, before conviction, may be admitted to bail by the consul who tries him, except in capital cases.
65. *Capital cases.*—No prisoner charged with a capital offence shall be admitted to bail where the proof is evident, or the presumption of his guilt great.
66. *After conviction.*—After conviction and appeal the prisoner may be admitted to bail only by the minister.
67. *American bail.*—Any citizen of the United States offering himself as bail shall sign and swear, before the consul, to a schedule of unincumbered property of a value at least double the amount of the required bail.
68 *Foreign bail.*—Any other proposed bail or security shall sign and swear before the consul to a similar schedule of unincumbered personal property within the local jurisdiction of the consulate, or he may be required to deposit the amount in money or valuables with the consul.

69. *Two sureties.*—Unless such sufficient citizen becomes bail, or such deposit be made, at least two sureties shall be required.

70. *Surrender.*—Any American bail may have leave of the consul to surrender his principal on payment of all costs and expenses.

71. *Prosecutor may be required to give security.*—Any complainant, informant, or prosecutor may be required to give security for all costs of the prosecution, including those of the accused; and every complainant, &c., not a citizen of the United States, shall be so required, unless, in the consul's opinion, justice will be better promoted otherwise; and when such security is refused the prosecution shall abate.

72. *Honorable acquittal.*—When the innocence of the accused, both in law and intention, is manifest, the consul shall add to the usual judgment of acquittal the word "honorably."

73. *Costs.*—In such case judgment may be given and execution issued summarily against any informer, complainant, or prosecutor for the whole costs of the trial, including those of the accused, or for any part of either, or both, if the proceeding appears to have been groundless and vexatious, originating in corrupt, malicious, or vindictive motives.

74. *Minor offences.*—Consuls will ordinarily encourage the settlement of all prosecutions not of a heinous character by the parties aggrieved or concerned.

XIII.—OATHS.

75. Oaths shall be administered in some language that the witness understands.

76. *Not Christians.*—A witness not a Christian shall be sworn according to his religious belief.

77. *Atheist.*—An avowed atheist shall not be sworn, but may affirm, under the pains and penalties of perjury; the credibility of his evidence being for the consideration of the consul.

78. *Affirmation.*—A Christian, conscientiously scrupulous of an oath, may affirm, under the pains and penalties of perjury.

XIV.—DOCKETS, RECORDS, ETC.

79. *Civil docket.*—Each consul shall keep a regular docket or calendar of all civil actions and proceedings, entering each case separately, numbering consecutively to the end of his term of office, with the date of filing, the names of the parties in full, their nationality, the nature of the proceeding, the sum or thing claimed, with minutes and dates of all orders, decrees, continuances, appeals, and proceedings, until final judgment.

80. *Criminal* —He shall keep another regular docket for all criminal cases, with sufficient similar memoranda.

81. *Filing papers.*—All original papers shall be filed at once and never removed; no person but an officer of the consulate or minister should be allowed access to them. All papers in a case must be kept together in one enclosure, and numbered as in the docket, with the parties' names, the nature of the proceeding, the year of filing the petition, and of final judgment conspicuously marked on the enclosure, and each year's cases kept by themselves in their order.

XV.—LIMITATION OF ACTIONS AND PROSECUTIONS.

82. *Criminal.*—Heinous offences not capital must be prosecuted within six years; minor offences within one.

83. *Civil.*—Civil actions, based on written promise, contract, or instrument, must be commenced within six years after the cause of action accrues; others within two.

84. *Absence; fraudulent concealment.*—In prosecutions for heinous offences not capital, and in civil cases involving more than $500, any absence of respondent or defendant for more than three months at a time from China shall be added to the limitation; and in civil cases involving more than $100, the period during which the cause of action may be fraudulently concealed by defendant shall likewise be added.

XVI.—GENERAL PROVISIONS.

85. *Trials public.*—All trials and proceedings in the United States consular courts in China shall be open and public.

86. *Interpreting and translating.*—Papers and testimony in a foreign language shall be translated into English by a sworn interpreter appointed by the consul; in civil cases to be paid by petitioner. Oaths and questions shall be translated by the interpreter from the English for any witness who does not understand English.

87. *Testimony.*—Parties may be required to file their petitions, answers, complaints, informations, and all other papers addressed to the court in English; or they may be translated by the interpreter at the consul's discretion. All testimony must be taken in writing in open court by the consul or his order, and signed by the witness, after being read over to him for his approval and correction, and it shall form part of the papers in the case.

88. *Adjournment.*—The consul may adjourn his court from time to time and place to place within his jurisdiction, always commencing proceedings and giving judgment at the consulate.

89. *Officer.*—All processes not served by the consul personally must be executed by an officer of the consulate, who shall sign his return, specifying the time and mode of service, and annexing an account of his fees.

90. *Copies on appeal.*—On appeal, copies of all the papers must be paid for in advance by the appellant, except in criminal cases where respondent is unable to pay.

91. *Copies.*—Any person interested is entitled to a copy of any paper on file, on prepayment of the fee.

92. Reasonable clearness, precision, and certainty should be required in the papers, and substantial justice and all practicable despatch is expected in the decisions.

93. *Definition of consul.*—The word "consul" is intended to include the consul general, and any vice-consul or deputy consul actually exercising the consular power at any consulate, unless the sense requires a more limited construction.

94. *Associates.*—Each associate in a consular trial shall, before entering on his duties, be sworn by the consul. Before taking the oath he may be challenged by either party, and for sufficient cause excused and another drawn.

95. *Contempt.*—Consuls will always preserve order in court, punishing summarily any contempt committed in their presence, or any refusal to obey their lawful summons or order, by imprisonment not exceeding twenty-four hours, or by fine not exceeding fifty dollars and costs.

96. *Attorney.*—Every party to a civil or criminal proceeding may be heard in person, or by attorney of his choice, or by both; but the presence of counsel shall be under the exclusive control and discretion of the consul.

97. *Accounts.*—The accounts of the consular courts shall be kept in United States currency; and every order of deposit, decree of costs, taxation of fees, and, generally, every paper issuing originally from the court, shall be expressed in dollars and cents, and satisfied in United States metallic currency, or its equivalent.

XVII.—FEES.

98. In consular court—

In all cases where the amount in question is not more than $500	$5 00
In all cases where it is over $500	15 00
In all cases where no specific damages are sought, the fee shall be $5 for minor, and $15 for greater cases.	

99. Clerk's fees—

For issuing all writs, warrants, attachments, or other compulsory process	1 50
For docketing every suit commenced	1 00
For executions	1 00
For summonses and subpœnas	50
For all records at the rate of, for each hundred words	20
For drawing every notice, paper, order, or process, not otherwise provided for	2 00
And if it exceed 200 words, for every additional hundred words	1 00
For every seal to process issued	1 00
For filing each paper upon the return of the marshal, and all other papers filed in court.	10

100. Marshal's fees—

For apprehending a deserter and delivering him on board the vessel deserted from, to be paid by the vessel before leaving port	5 00
For searching for the same, and if not found, to be certified by the consul, and on his order to be paid by said ship	2 00
For serving any writ, warrant, attachment, or other compulsory process, each person.	2 00
For serving summons	1 00
For returning all writs, attachments, warrants, and summons, each	50
For each bail-bond	1 00
For every commitment or discharge of prisoner	2 00
On subpœnas for each witness summoned	50
For returning subpœna	25
For each day's attendance upon court	3 00
For levying execution	1 50
For advertising property for sale	2 00
For releasing property under execution, by order of plaintiff	3 00
For selling property under execution when the amount collected does not exceed $1,000	5 per cent.
If over $1,000, and not exceeding $5,000	3 per cent.
If over $5,000	2 per cent.
For making collections under $200, in cases where no adjudication has taken place	5 per cent.
If the amount exceed $200	2½ "
For travelling fees in serving all processes, each mile	$0 15
For serving every notice not hereinafter provided for, in addition to the usual travelling fees	0 50

101. Interpreter's fees—

For each day's attendance upon court	3 00
For making translations	2 00
If more than 200 words, for each additional hundred	1 00

102. Witnesses' fees—

For every day's attendance at court	1 50
For each mile travelled in going to and returning from court	0 15

103. Crier's fees.—

On trial of every suit	1 00

104. Citizen associate's fees—

For each day's attendance	3 00

105. Costs for prevailing party—
All necessary court fees paid out.

XVIII.—PROVISO.

106. All decrees heretofore issued by authority of the commissioners and ministers of the United States to China, which are inconsistent in whole or in part with the provisions of this decree, are hereby annulled, and those portions are henceforth void and of no effect; and the promulgation of these rules abrogates no authority hitherto lawfully exercised by consuls in China not inconsistent herewith.

ANSON BURLINGAME.

LEGATION OF THE UNITED STATES TO CHINA,
Peking, *April* 23, 1864.

Assented to:
PEKING, *April* 23, 1864.
GEO. F. SEWARD, *Consul General*.

Assented to:
CANTON, *July* 12, 1864.
OLIVER H. PERRY, *U. S. Consul*.

Assented to:
SWATOW, *September* 3, 1864.
J. C. A. WINGATE, *U. S. Consul*.

Assented to:
AMOY, *August* 30, 1864.
OLIVER B. BRADFORD, *U. S. Vice-consul*.

Assented to:
FOO-CHOW-FOO, 1864.
A. L. CLARKE, *U. S. Vice-consul*.

Assented to:
NINGPO, *June* 20, 1864.
EDWARD C. LORD, *U. S. Vice-consul*.

Assented to:
HANKOW, *June* 11, 1864.
WM. BRECK, *U. S. Consul*.

Assented to:
KIUKIANG, *June* 13, 1864.
H. G. BRIDGES, *U. S. Vice-consul*.

Assented to:
TIENTSIN, *April* 27, 1864.
S. W. POMEROY, JR., *U. S. Vice-consul*.

Assented to:
CHINKIANG, *June* 2, 1864.
G. H. COLTON SALTER, *Acting U. S. Consul*.

[Circular No. 3.—A.]

CONSULATE GENERAL OF UNITED STATES,
Shanghae, *October* 25, 1864.

SIR: I have the honor to transmit to you herewith a certified copy of each of the decrees of April last, which have already received your approval. They will be made public at this port on the day named in the notification, and it is expected that they will reach you in time for circulation on the same date.

In reply to inquiries which have been made, I have to state that no new forms of processes have as yet been prescribed. The experience of the various consular officers will readily effect the changes which may become necessary under the new regulations.

The fee headed "in consular court" is, together with all fines imposed, to be brought to the credit of the United States in the account required by section 17th of the act of Congress. The clerks' and marshals' fees may, as heretofore, be passed to those officers.

The judicial report, form 132, should be regularly transmitted, as required in section 312,

Consul's Manual. In the absence of a marshal it may be prepared by the clerk of the court, or by the consul himself. I should recommend that the "court account" should also be transmitted quarterly.

It is expected that the decree of registry will be very useful in preventing to an extent the abuse of the national name, which has been so common in China. The various officers will, I think, find it of much advantage to insist strenuously upon the registry of all persons under their jurisdiction.

In cases when an offender, who is not registered, and who has no satisfactory proof in support of his claim to citizenship, is arrested and handed to you for punishment, you will perhaps find it desirable to deliver him to the Chinese authorities. In such case the condition may be made, that the native officer shall sit at the trial with two consular officers as assessors, who shall have power to veto his decision. If, however, you should prefer to proceed yourself with the trial, it has been held at Peking that the offender, having submitted himself to the jurisdiction of the court, must abide by its decision.

Your obedient servant,

GEORGE F. SEWARD,
United States Consul General.

——— ———,
United States Consul.

No. 7766

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE COUNTY OF MARICOPA, STATE OF ARIZONA,

Appellant.

vs.

OLIVIA ROSEVEARE,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the District of Arizona.

FILED

MAR 15 193

PAUL P. O'BRIEN,

FEDERAL PRINTING AND COMPOSITION COMPANY, SAN FRANCISCO, CALIFORNIA

No. 7766

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE COUNTY OF MARICOPA, STATE OF ARIZONA,

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OLIVIA ROSEVEARE,

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Transcript of Record

Upon Appeal from the United States District Court for the District of Arizona.

FEDERAL PRINTING AND COMPOSITION COMPANY, SAN FRANCISCO, CALIFORNIA

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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Phoenix, Arizona.

EARL ANDERSON,

Deputy County Attorney of Maricopa County,

Phoenix, Arizona.

Attorneys for Appellant.

DON P. SKOUSEN,

Fleming Building,

Phoenix, Arizona.

Attorney for Appellee. [3]*

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* Page numbering appearing at the foot of page of original certified Transcript of Record.

Minute Entry of
MONDAY, NOVEMBER 2, 1931

October 1931 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, presiding

L-812

OLIVIA ROSEVEARE,

Plaintiff,

vs.

THE COUNTY OF MARICOPA, STATE OF ARIZONA,

Defendant.

Defendant's Motion to make Complaint More Definite and Certain, and Defendant's Special Demurrers to Plaintiff's Complaint, come on regularly for hearing this day.

M. L. Ollerton, Esquire, appears for D. P. Skousen, Esquire, counsel of record for the Plaintiff. Dudley W. Windes, Esquire, and Charles L. Strouss, Esquire, appear as counsel for the defendant.

Argument is now had by respective counsel, and

IT IS ORDERED that said Defendant's Motion to Make Complaint More Definite and Certain be and the same is hereby granted, and that said Defendant's Special Demurrers to Plaintiff's Com-

plaint be continued and reset for hearing on Monday, November 9, 1931, at the hour of ten o'clock A. M. [4]

Minute Entry of
MONDAY, NOVEMBER 9, 1931

October 1931 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, presiding

[Title of Cause.]

Defendant's Special Demurrers to Plaintiff's Complaint, come on regularly for hearing this day.

D. P. Skousen, Esquire, appears for the Plaintiff. Dudley W. Windes, Esquire, appears as counsel for the Defendant.

On motion of said counsel for the Defendant, and upon consent of Counsel for the Plaintiff,

IT IS ORDERED that said Defendant's Special Demurrer to Plaintiff's Complaint be continued and reset for hearing on Monday, November 23, 1931, at the hour of ten o'clock A. M. [5]

Minute Entry of
TUESDAY, DECEMBER 1, 1931

October 1931 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, presiding

[Title of Cause.]

On motion of W. W. Clark, Esquire, appearing for Dudley W. Windes, Esquire, counsel for the Defendant.

IT IS ORDERED that Defendant's Special Demurrer to Plaintiff's Complaint be reinstated upon the Law and Motion Calendar and set for hearing December 14, 1931, at the hour of ten o'clock A. M. [6]

In the District Court of the United States for the District of Arizona

No. L-812-Phx
AT LAW

Phoenix, Maricopa County, State of Arizona

OLIVIA ROSEVEARE,

Plaintiff,

vs.

THE COUNTY OF MARICOPA, STATE OF ARIZONA,

Defendant.

PLAINTIFF'S AMENDED COMPLAINT

COMES NOW the plaintiff by her attorneys, D. P. Skousen and M. L. Ollerton, and for cause of action against the defendant, alleges:

FIRST CAUSE OF ACTION:

I.

That the plaintiff is a resident of Madison, State of Wisconsin. That the defendant is now, and at all times hereinafter mentioned, was a municipal corporation and a body politic corporate, and one of the legal divisions of the State of Arizona, to wit, one of the Counties in which the State of Arizona has been, and is divided.

II.

That this is an action at law brought to recover taxes illegally assessed and collected upon United States homestead lands, filed upon and entered by the plaintiff and various sundry other persons hereinafter named, by the County of Maricopa, State of Arizona.

III.

That this action involves Clause One (1) Section Two (2), and Clause Two (2) Section Three (3) Article Four (4) of the United States Constitution, and Section One (1) of the Fourteenth (14) Amendment thereof, and Clauses One and Eighteen (18) Section Eight (8) Article One (1) and Paragraph Two (2) Article Six (6) [7] of said United States Constitution; and laws enacted by the Congress of the United States in pursuance of said constitutional provisions relating to the disposition and sale of public lands and defining the rights, privileges, and immunities of homesteaders deriving title from the United States Government; and involves

also the right of the County of Maricopa to appropriate property of homesteaders on United States Public Lands without due process of law, and the denial to said homesteaders of the equal protection of the law, and the construction, application and enforcement of the Statutes of the State of Arizona in contravention of the Constitution and laws of the United States.

IV.

That on or about the year 1872, the land and premises hereinafter described as being in Maricopa county, State of Arizona, then the Territory of Arizona, became subject to entry under the public land laws of the United States, and among others subject to entry under the General Homestead Law as provided by the Act of May 20, 1862, and Act amendatory thereof and supplementary thereto.

That under and by virtue of said Act of May 20, 1862, and acts amendatory thereof and supplementary thereto, the Secretary of the Interior Department of the United States Government was and is authorized to perform any and all acts, and to make such rules and regulations as may be necessary or proper for the purpose of carrying out the provisions of said Acts.

That pursuant to said authority the Secretary of the Interior prescribed rules and regulations relating to homestead entries under said general homestead law under the title of "Suggestions to Homesteaders and persons desiring to make Homestead

Entries," which said regulations are hereby referred to and made part hereof as fully and to all intents and purposes as if incorporated herein.

That said Acts, rules and regulations provide, among other things: [8]

That every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the Naturalization Laws, shall be entitled to enter one quarter section or a less quantity of unappropriated public lands, to be selected in and be in conformity with the legal subdivisions of the public lands, by applying to enter said lands and making and subscribing before a proper officer and in a proper Land Office of the United States an affidavit showing that he or she is qualified to make said entry.

Every person making a homestead entry under said public land laws and regulations is required, among other things, to establish a residence upon the tract of land entered within six months after the date of entry, and maintain a residence thereon for a period of not less than three years, and to cultivate said land for a period of at least two years; to submit final proof within five or seven years from date of entry as to residence, cultivation and improvements, first giving notice of the time and place for submission of final proof, as required by laws and regulations.

V.

That thereafter the said public land laws were further amended and supplemented by the Act of June 17, 1902, commonly known as the "Reclamation Act."

That said Reclamation Act, and Acts amendatory thereof and supplementary thereto, provided for the withdrawal of public lands from all forms of entry except under homestead laws, and except when subject to the provisions, limitations, charges, terms and conditions of said Reclamation Act and acts amendatory thereof and supplementary thereto.

That under and by virtue of said Reclamation Act and acts amendatory thereof and supplementary thereto, the Secretary of [9] the Interior was and is authorized to perform any and all acts and to make such rules and regulations as may be necessary or proper for the carrying out of the provisions of said acts.

That pursuant to said authority the Secretary of the Interior, upon the passage of said acts, prescribed rules and regulations relating to reclamation homestead entries within reclamation projects of the United States in a general circular known as "General Reclamation Circular", which said regulations are referred to and made part hereof as fully and to all intents and purposes as if incorporated herein.

That under said Reclamation Act and amendments and supplements thereto, and the rules and regulations prescribed thereunder, the Secretary

of the Interior Department of the United States Government is authorized and empowered to determine the area of lands for which one person may obtain title under said Acts and regulations in each and every reclamation project.

That each entry is subject to re-adjustment by said Secretary of the Interior, and that said Secretary of the Interior is not required to confine any Farm Unit established by him to the limits of any entry theretofore made, but may combine any legal subdivision thereof with any contiguous tract lying outside of said entry.

That homestead entrymen within reclamation projects are precluded from making final proof and from receiving final certificate or patent until said Secretary of the Interior shall have determined the Farm Unit for such reclamation project.

That each homestead entryman under said reclamation act is required to confirm his entry to such Farm Unit as may be established by the said Secretary of the Interior.

That in addition to the acts and things required of homestead entrymen under the General Homestead Law, homestead entrymen of lands lying in irrigation projects are required to clear [10] the land, entered by or assigned to them, of brush, trees and other incumbrances, to provide the same with sufficient laterals for its effective irrigation, to grade the same and put it in proper condition for irrigation and crop growth, to plant, irrigate and cultivate during at least two years next preceding

the time of filing the Final Affidavit, hereinafter mentioned, at least one-half of the irrigable area of his entry, and to grow satisfactory crops thereon.

That under said reclamation acts and the regulations no Final Certificate can be issued until the doing of all the things enumerated under said Acts and regulations, particularly the acts and things herein mentioned.

That in addition to the proof required under the general homestead laws of the United States, homestead entrymen upon homesteads within any reclamation project are required, as appears from said acts and regulations and Form of Notice of acceptance of Proof of Homestead residence issued by the U. S. Land Office officials, to submit to the United States Land Office, in which such reclamation project is located, an affidavit, corroborated by two witnesses, showing that the land entered by him, or assigned to him, has been cleared of brush, trees, and other incumbrances, provided with sufficient laterals for its effective irrigation, graded and otherwise put in proper condition for irrigation and crop growth, planted, irrigated and cultivated, and during at least two years next preceding the date of the filing of Final Affidavit that satisfactory crops have been grown on at least one-half of the irrigable area thereof.

That said entryman is further required, before the issuance of Final Certificate, to pay to the Land Office Officials of the proper Land Office the sum of $1.50 for each legal subdivision included in each

farm unit, together with all water charges due thereon. [11]

That upon the compliance with the requirements of said Reclamation Acts and regulations, Final Certificate is issued to said Reclamation Homestead entryman or assigns, reserving a lien to the United States Government for charges due for the irrigation works supplying said irrigation project with water, and that thereafter patent for said land issued to such entryman or assigns containing like reservations of a lien to the United States Government.

VI.

That on the 17th day of July, 1902, the Secretary of the Interior withdrew the lands and premises hereinafter described as lying and being in Maricopa County, State of Arizona, from all entries except homestead entries under the Act of June 17, 1902, and acts amendatory thereof and supplementary thereto, and the regulations promulgated thereunder.

VII.

That thereafter, to wit, on the 25th day of June, 1904, said lands were incorporated in that certain reclamation project established under and by virtue of said Act of June 17, 1902, and acts amendatory thereof and supplementary thereto, and designated the "Salt River Project".

VIII.

That on the 14th day of February, 1912, the Territory of Arizona was admitted into the Federal Union by Enabling Act approved June 20, 1910, whereby the lands and property belonging to the United States of America, or reserved for its use, were exempted from taxation.

IX.

That on the 18th day of January, 1917, the Secretary of the Interior Department of the United States Government established the area which might be included in any one entry or farm Unit within the said Salt River Project at forty (40) acres. [12]

X.

That on the said 18th day of January, 1917, the Secretary of the Interior Department of the United States Government established Farm Units within the Salt River Valley under said Reclamation Act of June 17, 1902, and the regulations issued thereunder, and ordered and required all homestead entrymen within two years from the date thereof to conform their entry to such Farm Unit.

XI.

That this plaintiff and the different persons, assignors of this plaintiff, whose names are entered and set forth in the plaintiff's Additional Causes of Action, made entry of the various tracts of land described in plaintiff's said additional causes

of action and insofar as required at said times and under the then existing circumstances and regulations, fully and truly in every particular complied with the requirements of said general homestead laws and said reclamation homestead laws and made entries for the respective tracts set out and described in the plaintiff's said additional causes of action, and proofs regarding the same, and assignments thereof upon the date set forth as will hereafter more fully appear, made and executed assignments of their various causes of action for valuable consideration to this plaintiff.

XII.

That previous to the making and acceptance of final proof, and the payment of the moneys due the Federal Government, and the issuance of final certificate thereof, the said premises of this plaintiff and each and all the premises described in plaintiff's said additional causes of action, and each and all thereof, under the Constitution and laws of the United States, were the property of said United States of America, and were exempt from taxation by the State of Arizona, and all municipalities thereof. [13]

XIII.

That after the incorporation of said lands within the Salt River Project, to wit, the 25th day of June, 1904, and the establishment of said lands as reclamation homestead entries, to wit, during the years from 1911 to and including 1925, and before

the issuance of final certificate or patent to the plaintiff herein for her said land, and before the issuance of final certificate or patent to the plaintiff's assignors set out in said additional causes of action, the County authorities of Maricopa County, State of Arizona, (then the Territory of Arizona), assessed said lands of this plaintiff and all of said lands described in plaintiff's said additional causes of action for the State and County taxes for said County, Territory and State aforesaid, and thereafter the Board of Supervisors of said County and State levied taxes against the lands of this plaintiff and each and all of the various tracts of land described in plaintiff's said additional causes of action, and in the amounts and sums in said additional causes of action shown, which taxes were duly entered upon the public tax records of said County and State, and officially declared a lien upon said lands as in cases of assessments and levies upon and against other lands individually and privately owned by others than the United States or homestead entrymen.

XIV.

That thereafter each year from 1911 during the continuance of the Territorial status of said State of Arizona, and following the admission of said Territory as a State into the Federal Union up to and including 1925, said County and State authorities annually assessed and levied taxes against said premises for each and every one of

said years; that said taxes were thereafter duly entered upon the public tax records of Maricopa County, State of Arizona, and by said authorities, in manner and form for the assessment and taxing of real property according to the Statutes [14] of Arizona, officially declared to be a first lien upon said lands.

XV.

That the Statutes of the State of Arizona relating to the assessment, levy and collection of taxes including Chapter 75, Article 5, Revised Statutes of the State of Arizona, 1928, and amendments thereof and supplements thereto, applied, construed and enforced by the taxing officials of said State of Arizona and said County of Maricopa, are hereby referred to and made part hereof as though fully incorporated herein. That said Revenue Statutes of said State of Arizona provide, inter alia, particularly Paragraph 3136 of said Chapter 75, Article 7, page 732, 1928 Revised Statutes of Arizona, that no person shall be permitted for any reason to test the validity of any tax assessed unless the amount of such tax shall have first been paid to the official whose duty it is to collect the same, together with all penalties and costs, but that after payment an action may be maintained to recover any tax illegally collected.

XVI.

That said Revenue Statutes of the State of Arizona further provide, inter alia, for the attachment, accumulation, operation and enforcement of great and onerous and cumulative penalties, fees, interest and compound interest and charges against each and every taxpayer for his failure to pay taxes assessed as the same become due, which penalties, interests, charges and expenses must be paid at the time of payment of said tax originally assessed and become a lien against the property assessed in the same manner as the said original tax.

XVII.

That by reason of the premises aforesaid, the said officials of Maricopa County, including the County Assessor and County Treasurer thereof, in each and all of said years herein mentioned, [15] claimed, alleged and declared that there was legally due and owing from this plaintiff and the various persons whose names are set forth in plaintiff's said additional causes of action, as and for taxes assessed for said years hereinbefore mentioned upon said additional causes of action, the various sums and each and all thereof in said additional causes of action mentioned, for and as taxes alleged by said officials of said county to have been duly and legally assessed and levied against the various premises in said additional causes of action, described, and which sums and each and all thereof the County Treasurer claimed to be due from this plaintiff

and each and all of said plaintiff's assignors to the County of Maricopa and State of Arizona.

That during each and all of said years, to wit, 1911 to 1925 inclusive, as aforesaid, despite the fact, as aforesaid, that final proof had not been made thereon, and despite the fact that no affidavit of proof of reclamation, improvement and irrigation relating thereto had been made, or fees paid thereon, and despite the fact that no final certificate had been issued therefor, the said County of Maricopa, acting in this regard by its duly elected officials, at all times herein required, requested, demanded and insisted upon payment, by this plaintiff and each and all of the persons whose names are set forth in plaintiff's said additional causes of action, of the taxes so assessed and levied against the said premises and all thereof, described, as aforesaid, in plaintiff's said additional causes of action.

XVIII.

That this plaintiff and the various persons whose names are set forth in plaintiff's additional causes of action at all times herein mentioned protested and objected to the taxation of their respective tracts of land for the reason that title to the same was still in the United States Government and that said County taxing authorities were without power or authority to tax lands [16] of the character of homestead lands for which final certificate had not been issued.

That this plaintiff and the various persons whose names are set forth in said additional causes of

action and many others united in forming an association to object and protest against the taxation of said lands and that they and each and all of them individually and collectively protested and objected to the assessment of their lands and the levying and collection of taxes thereon.

XIX.

That notwithstanding the protesting and objecting of this plaintiff and said various persons whose names are set forth in plaintiff's additional causes of action, the said County of Maricopa demanded that the said taxes levied as aforesaid, together with all penalties, interest and charges be paid upon said respective tracts of land, and threatened to sell the lands of this plaintiff and the lands of said various other persons for said taxes, interest and penalties; and threatened to dispossess this plaintiff and said various other persons from their respective tracts of land.

That said County of Maricopa through its duly elected officials instituted a great number of suits for the collection of taxes assessed against homesteads lands similarly situated, and brought various and numerous onerous and annoying suits against the members of said taxpayers association and the various persons whose names are set forth in said additional causes of action to enforce the levy of said taxes and to collect the same; and by public announcements, publications, declarations and proclamations announced and declared that said County of Maricopa proposed to collect each and all of said

taxes and to sell each and all of said premises and to dispossess each and all of said homestead entrymen unless said taxes were paid. [17]

XX.

That on the 12th day of December, 1919, an action was filed by one, William Irwin, plaintiff, v. Vernon Wright, defendant, the latter being the treasurer and tax collector of Maricopa County, State of Arizona, and which suit was carried to the United States Supreme Court, said suit being reported in 258 United States Reports, page 219. The Supreme Court of the United States held in the said suit that the taxes so levied, assessed and collected were done so illegally. That the said suit as filed and the appeal thereof and the decision of the United States Supreme Court are made a part hereof by specific reference and are incorporated herein as if set out as a part of this complaint.

XXI.

That while the suit referred to in the preceding paragraph was being prosecuted and carried up through the various courts of the United States to the Supreme Court of the United States, the County of Maricopa, by its officers and officials, continued to collect taxes on lands that the final certificates had not yet been issued to and filed and brought many onerous, expensive and annoying suits against homestead entrymen in the Salt River Project for the collection of taxes.

XXII.

That said taxes were not voluntarily paid, but on the contrary the payment of said taxes was involuntary and under protest and objection, and was paid to prevent the dispossession of this plaintiff by said County, and the consequent interference with her compliance with the United States Homestead law, to prevent a sale of her said premises and a cloud upon her title, to prevent the accumulation of great and onerous penalties and interest; that the collecting of said taxes by said County produced serious consequences and irreparable injuries to this plaintiff and her property rights; to prevent a seizure of her property [18] and additional irreparable injury, and that said payment was made under duress, coercion and intimidation; that the same methods were used to enforce payment from, and the same injuries suffered by each of the assignors in the additional causes of action of this plaintiff.

XXIII.

That the assessing, levying and collecting of said taxes was made arbitrarily and without due process of law, and in denial of the equal protection of the law and the rights, privileges and immunities of this plaintiff and her said assignors holding said land as homesteaders and under the homestead laws of the United States, and in contravention of the constitution and laws of the United States.

That said County of Maricopa, though often re-

quested to so do, has failed and neglected and refused and still refuses to repay this plaintiff said taxes so paid to said County Treasurer; that said refusal to repay said taxes is without any authority, equity, justice or law, and that said funds so paid as taxes are due to this plaintiff from said defendant ex aequo et bono.

XXIV.

That this plaintiff is now, and at all times herein mentioned, was, the owner of the Southeast Quarter of Section thirty-three, Township one north, Range three East, G. S. R. B. & Meridian which said premises were then and there a reclamation homestead for which final certificate had not been issued and was then and there the property of the United States of America. That the final certificate was not issued to this plaintiff on her said land until the 20th day of October, 1919, and the final certificate was issued to each of the assignors of this plaintiff on the date or dates set out in the said additional causes of action.

XXV.

That between the 1st day of January, 1914, and the 30th day [19] of December, 1919, this plaintiff, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said County, paid to said Treasurer as taxes upon said homestead land the sum of Three Thousand One Hundred Twenty and 10/100 ($3120.-10) dollars.

WHEREFORE, plaintiff prays judgment against said defendant for the sum of $3120.10, together with interest thereon at the legal rate from the time of payment thereof until the rendition of judgment herein, together with costs and disbursements herein expended, and for such other and further relief as to the Court may seem just and equitable.

OLIVIA ROSEVEARE,
Plaintiff.

D. P. SKOUSEN,
M. L. OLLERTON,
Attorneys for Plaintiff.

COMES NOW the plaintiff by her attorneys, D. P. Skousen and M. L. Ollerton, and for additional causes of action against the defendant, alleges:

SECOND CAUSE OF ACTION:

I.

This plaintiff reiterates the statements and allegations and facts set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same part of this, her second cause of action. [20]

II.

That Wm. S. Doner, assignor of this plaintiff, was, during the years from 1911 to 1918 inclusive, the owner of the Northeast quarter of the Southwest quarter of the Southwest quarter of Section

Twenty-eight, Township One North, Range Three East, G. S. R. B. and Meridian; that the said Doner entered and filed upon the said property on the 26th day of September, 1906, and paid taxes thereon from the year 1911 to 1918 inclusive; that said Doner paid the aggregate sum of $453.11 taxes during those said years. That final certificate was issued to the said Doner in April of 1919. That said land was not subject to taxation until the year 1920; that the said lands during the years from 1911 to 1918 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1911, and the 30th day of December, 1918, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said County, paid to said Treasurer as taxes upon said homestead land the sum of $453.11.

IV.

That after the payment of the taxes by the said Doner, as above set forth, the said Doner did, for valuable consideration, sell, transfer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of

Maricopa, but that said County refused and still refuses to repay the same or any part thereof.

[21]

THIRD CAUSE OF ACTION:

And the plaintiff for a third cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same part of this, her third cause of action.

II.

That J. J. Fagan, assignor of this plaintiff, was, during the years from 1915 to 1917 inclusive, the owner of the Northeast quarter of the Southeast quarter of Section One, Township One South, Range Two East, G. & S. R. B. & Meridian; that the said Fagan entered and filed upon the said property on the 2nd day of June, 1915, and paid taxes thereon from the year 1915 to 1917 inclusive; that said Fagan paid the aggregate sum of $308.56 taxes during those said years. That said Fagan assigned to Wm Wetzler on October 5, 1917. That said land was not subject to taxation during the years 1915, 1916 and 1917 but were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1915, and the 30th day of December, 1917, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said County, paid to said Treasurer as taxes upon said homestead land the sum of $308.56.

IV.

That after the payment of the taxes by the said Fagan, as above set forth, the said Fagan, did, for valuable consideration, sell, transfer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to the bringing [22] of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said County refused and still refuses to repay the same or any part thereof.

FOURTH CAUSE OF ACTION:

And the plaintiff for a fourth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same part of this, her fourth cause of action.

II.

That E. Hanson, assignor of this plaintiff, was, during the years 1917 to 1920 inclusive, the owner of the Northeast quarter of the Southwest quarter of Section One, Township One South, Range Two East, G. & S. R. B. & Meridian; that the said Hanson entered and filed upon the said property on the 2nd day of May, 1917, and paid taxes thereon from the year 1917 to 1920 inclusive; that final certificate was issued to the said Hanson January 19, 1920. That said land was not subject to taxation until the year 1921; that the said lands during the years from 1917 to 1920 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1917, and the 30th day of December, 1920, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said County, paid to said Treasurer as taxes upon said homestead land the sum of $418.70.

IV.

That after the payment of the taxes by the said Hanson, as above set forth, the said Hanson did, for valuable consideration [23] sell, transfer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous

to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said County refused and still refuses to repay the same or any part thereof.

FIFTH CAUSE OF ACTION:

And the plaintiff for a fifth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same part of this, her fifth cause of action.

II.

That Frank Irving, assignor of this plaintiff, was, during the years 1915 to 1918 inclusive, the owner of the Southwest quarter of the Northwest quarter of Section twenty-four, Township One North, Range One East, G. & S. R. B. & Meridian; that the said Irving entered and filed upon the said property on the 9th day of October, 1915, and paid taxes thereon from the year 1915 to 1918 inclusive; that final certificate was issued to said Irving July 2, 1918. That said land was not subject to taxation until the year 1919; that the said lands during the years from 1915 to 1918 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1915, and the 30th day of December, 1918, this assignor, upon

demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said County, paid to said Treasurer as taxes upon said homestead land the sum of $58.75. [24]

IV.

That after the payment of the taxes by the said Irving, as above set forth, the said Irving did, for valuable consideration, sell, transfer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said County refused and still refuses to repay the same or any part thereof.

SIXTH CAUSE OF ACTION:

I.

And the plaintiff for a sixth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same part of this, her sixth cause of action.

II.

That L. Irving, assignor of this plaintiff, was, during the years 1915 to 1917 inclusive, the owner of the Northwest quarter of the Southwest quarter of Section twenty-four, Township One North,

Range One East, G. & S. R. B. & Meridian; that the said Irving entered and filed upon the said property on the 17th day of May, 1907, and paid taxes thereon from the year 1915 to 1917 inclusive; that final certificate was issued to said Irving on July 2, 1918. That said land was not subject to taxation until the year 1919; that the said lands during the years from 1915 to 1918 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1915, and the 30th [25] day of December, 1918, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said County, paid to said Treasurer as taxes upon said homestead land the sum of $72.81.

IV.

That after the payment of the taxes by the said Irving, as above set forth, the said Irving did, for valuable consideration, sell, transfer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said County refused and still refuses to repay the same or any part thereof.

SEVENTH CAUSE OF ACTION:

I.

And the plaintiff for a seventh cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same part of this, her seventh cause of action.

II.

That Geo. Lutgerding, assignor of this plaintiff, was, during the years 1918 to 1921, inclusive, the owner of the Southeast quarter of the Northeast quarter of Section One, Township One South, Range Two East, G. & S. R. B. & Meridian; that the said Lutgerding entered and filed upon the said property on the 23rd day of December, 1918, and paid taxes thereon from the year 1918 to 1921 inclusive; that final certificate was issued to said Lutgerding on the 11th day of October, 1921. That said [26] land was not subject to taxation until the year 1922; that the said lands during the years from 1918 to 1921 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1918, and the 30th day of December, 1921, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer

of said County, paid to said Treasurer as taxes upon said homestead land the sum of $538.32.

IV.

That after the payment of the taxes by the said Lutgerding, as above set forth, the said Lutgerding did, for valuable consideration, sell, transfer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said County refused and still refuses to repay the same or any part thereof.

EIGHTH CAUSE OF ACTION:

I.

And the plaintiff for a *seventh* cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same part of this, her eighth cause of action.

II.

That Mabel Lutgerding, assignor of this plaintiff, was, during the years 1918 to 1923 inclusive, the owner of the Northeast quarter of the Northeast quarter of Section One, Township [27] One South, Range Two East, G. & S. R. B. & Meridian; that

the said Lutgerding entered and filed upon the said property on the 23rd day of December, 1918, and paid taxes thereon from the year 1918 to 1923 inclusive; that said Mabel Lutgerding assigned to Mary Beck on October 22, 1923; that said land was not subject to taxation until the year 1928; that the said lands during the years from 1918 to 1923 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1918, and the 30th day of December, 1923, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said County, paid to said Treasurer as taxes upon said homestead land the sum of $360.40.

IV.

That after the payment of the taxes by the said Mabel Lutgerding, as above set forth, the said Lutgerding did, for valuable consideration, sell, transfer and assign to this plaintiff all her right of action and right, title and interest in and to said account and the taxes paid by her as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said County refused and still refuses to repay the same or any part thereof.

NINTH CAUSE OF ACTION:

I.

And the plaintiff for a ninth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same part of this, her ninth cause of action. [28]

II.

That Mrs. R. J. McDougall, assignor of this plaintiff, was, during the years 1918 to 1921 inclusive, the owner of the Northwest quarter of the Northeast quarter of Section One, Township One South, Range Two East, G. & S. R. B. & Meridian; that the said Mrs. McDougall entered and filed upon the said property on the 23rd day of December, 1918, and paid taxes thereon from the year 1918 to 1921 inclusive; that said Mrs. R. J. McDougall received the final certificate to said land on June 14, 1921; that said land was not subject to taxation until the year 1922; that the said lands during the years from 1918 to 1922 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1918, and the 30th day of December, 1921, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of

said County, paid to said Treasurer as taxes upon said homestead land the sum of $538.32.

IV.

That after the payment of the taxes by the said Mrs. R. J. McDougall, as above set forth, the said Mrs. McDougall did, for valuable consideration, sell, transfer and assign to this plaintiff all her right of action and right, title and interest in and to said account and the taxes paid by her as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said County refused and still refuses to repay the same or any part thereof. [29]

TENTH CAUSE OF ACTION:

I.

And the plaintiff for a tenth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same part of this, her tenth cause of action.

II.

That Thos. J. Rice, assignor of this plaintiff, was, during the years 1916 to 1919 inclusive, the owner of the Southeast quarter of the Southwest quarter of Section twenty-eight, Township One North, Range Three East, G. & S. R. B. & Meridian; that

the said Rice entered and filed upon the said property on the 1st day of August, 1916, and paid taxes thereon from the year 1916 to 1919 inclusive; that the final certificate was issued to said Rice on the 5th day of March, 1919; that said land was not subject to taxation until the year 1920.

That Thos. J. Rice, assignor of this plaintiff, was, during the years 1908 to 1919 inclusive, the owner also of the Southwest quarter of the Southwest quarter of Section twenty-eight Township One North, Range Three East, G. & S. R. B. & Meridian; that the said Rice entered and filed upon the said property on the 13th day of February, 1908, and paid taxes thereon from the year 1913 to 1919 inclusive; that the final certificate was issued to said Rice on the 28th day of April, 1919; that said land was not subject to taxation until the year 1920.

That said lands during the years from 1908 to 1919 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1913, and the 30th [30] day of December, 1919, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said County, paid to said Treasurer as taxes upon said homestead lands the sum of $1047.08.

IV.

That after the payment of the taxes by the said Thos. J. Rice, as above set forth, the said Rice did, for valuable consideration, sell, transfer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

ELEVENTH CAUSE OF ACTION:

And the plaintiff for an eleventh cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same part of this her eleventh cause of action.

II.

That Wm. R. Roberson, assignor of this plaintiff, was, during the years 1908 to 1917 inclusive, the owner of the Northeast quarter of the Southwest quarter of Section One, Township One South, Range Two East, G. & S. R. B. & Meridian; that the said Roberson entered and filed upon the said property on the 13th day of January, 1908, and paid taxes thereon from the year 1914 to 1916 inclusive; that said Roberson assigned to E. Hanson

on the 2nd day of May, 1917; that said land was not subject to taxation during the years 1914, 1915 and 1916; that said lands during [31] the years from 1914 to 1916 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1914, and the 30th day of December, 1916, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said County, paid to said Treasurer as taxes upon said homestead lands the sum of $108.41.

IV.

That after the payment of the taxes by the said Wm. R. Roberson, as above set forth, the said Roberson did, for valuable consideration, sell, transfer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

TWELFTH CAUSE OF ACTION:

I.

And the plaintiff for a twelfth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in

the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same part of this her twelfth cause of action.

II.

That Richard Rosser, assignor of this plaintiff, was, during the years 1910 to 1925 inclusive, the owner of the North half of the Southeast quarter of Section thirty-three, Township One South, Range Two East, G. & S. R. B. & Meridian; that the said [32] Rosser entered and filed upon the said property in 1910 and paid taxes thereon from the year 1915 to 1925 inclusive; that final certificate was issued to said Rosser on September 19, 1925; that said land was not subject to taxation until the year 1926; that said lands during the years from 1910 to 1926 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1915, and the 30th day of December, 1925, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said county, paid to said Treasurer as taxes upon said homestead lands the sum of $1233.32.

IV.

That after the payment of the taxes by the said Richard Rosser, as above set forth, the said Rosser did, for valuable consideration, sell, transfer and

assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

THIRTEENTH CAUSE OF ACTION:

I.

And the plaintiff for a thirteenth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same part of this her thirteenth cause of action. [33]

II.

That Ernest T. Smith, assignor of this plaintiff, was, during the years from 1912 to 1918 inclusive, the owner of the Northwest quarter of the Southwest quarter of Section One, Township One South, Range Three East, G. & S. R. B. & Meridian; that the said Smith entered and filed upon the said property on the 24th day of September, 1912, and paid taxes thereon from the year 1915 to 1918 inclusive; that final certificate was issued to said Smith on May 1, 1918; that said land was not subject to taxation until the year 1919; that said lands during the

years from 1912 to 1919 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1915, and the 30th day of December, 1918, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said county, paid to said Treasurer as taxes upon said homestead lands the sum of $301.58.

IV.

That after the payment of the taxes by the said Ernest T. Smith, as above set forth, the said Smith did, for valuable consideration, sell, transfer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

FOURTEENTH CAUSE OF ACTION:

I.

And the plaintiff for a fourteenth cause of action against [34] the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose

of brevity and convenience makes the same part of this her fourteenth cause of action.

II.

That W. S. Stevens, assignor of this plaintiff, was, during the years from 1908 to 1919 inclusive, the owner of the South half of the Southwest quarter of Section twenty-eight, Township One North, Range Three East, G. & S. R. B. & Meridian; that the said Stevens entered and filed upon the said property on October 15, 1908, and paid taxes thereon from the year 1913 to 1919 inclusive; that final certificate was issued to said Stevens on April 28, 1919; that said land was not subject to taxation until the year 1920; that said lands during the years from 1908 to 1920 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1913, and the 30th day of December, 1919, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said county, paid to said Treasurer as taxes upon said homestead lands the sum of $1448.70.

IV.

That after the payment of the taxes by the said W. S. Stevens, as above set forth, the said Stevens did, for valuable consideration, sell, transfer and assign to this plaintiff all his right of action and

right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof. [35]

FIFTEENTH CAUSE OF ACTION:

And the plaintiff for a fifteenth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same a part of this her fifteenth cause of action.

II.

That James Willis, assignor of this plaintiff, was, during the years from 1917 to 1921 inclusive, the owner of the East half of the Southeast quarter of the Northwest quarter of Section twenty-four, Township One North, Range One East, G. & S. R. B. & Meridian; that the said Willis entered and filed upon the said property on July 2, 1917, and paid taxes thereon from the year 1917 to 1921 inclusive; that final certificate was issued to said Willis on February 24, 1921; that said land was not subject to taxation until the year 1922; that said lands during the years from 1917 to 1922 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1917, and the 30th day of December, 1921, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said county, paid to said Treasurer as taxes upon said homestead lands the sum of $467.01.

IV.

That after the payment of the taxes by the said James Willis, as above set forth, the said Willis did, for valuable consideration, sell, transfer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to [36] the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said County refused and still refuses to repay the same or any part thereof.

SIXTEENTH CAUSE OF ACTION:

And the plaintiff for a sixteenth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same a part of this her sixteenth cause of action.

II.

That Maude Willis, assignor of this plaintiff, was, during the years from 1910 to 1924 inclusive, the owner of the West half of the Southwest quarter of Section twenty-four, Township One North, Range One East, Gila and Salt River Base and Meridian; that said Maude Willis entered and filed upon the said property on April 22, 1910, and paid taxes thereon from *the* 1917 to 1924 inclusive; that final certificate was issued to said Maude Willis on February 23, 1924; that said land was not subject to taxation until the year 1925; that said lands during the years from 1910 to 1925 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1917, and the 30th day of December, 1924, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said county, paid to said Treasurer as taxes upon said homestead lands the sum of $2267.50.

IV.

That after the payment of the taxes by the said Maude [37] Willis, as above set forth, the said Maude Willis did, for valuable consideration, sell, transfer and assign to this plaintiff all her right of action and right, title and interest in and to said account and the taxes paid by her as aforesaid; that previous to the bringing of this action this

plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

SEVENTEENTH CAUSE OF ACTION:

And the plaintiff for a seventeenth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same a part of this her seventeenth cause of action.

II.

That J. R. Whitton, assignor of this plaintiff, was, during the years from 1918 to 1923 inclusive, the owner of Lot Six, Southeast quarter of Section Thirty-three, Township One North, Range Three East, G. & S. R. B. & Meridian; that said Whitton entered and filed upon the said property on July 26, 1918, and paid taxes thereon from the year 1918 to 1923 inclusive; that final certificate was issued to said Whitton on December 15, 1923; that said land was not subject to taxation until the year 1924; that said lands during the years from 1918 to 1924 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1918, and the 30th day of December, 1923, this assignor, upon

demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said county, paid to said Treasurer as taxes upon said [38] homestead lands the sum of $1391.88.

IV.

That after the payment of the taxes by the said J. R. Whitton, as above set forth, the said Whitton did, for valuable consideration, sell, transfer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

EIGHTEENTH CAUSE OF ACTION:

And the plaintiff for an eighteenth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same a part of this her eighteenth cause of action.

II.

That Frank Whitton, assignor of this plaintiff, was, during the years from 1915 to 1920 inclusive, the owner of the South half of the Southeast quarter of Section thirty-three, Township One North,

Range Three East, G. & S. R. B. & Meridian; that said Whitton entered and filed upon the said property in June, 1915, and paid taxes thereon from the year 1915 to 1920 inclusive; that final certificate was issued to said Whitton on March 6, 1920; that said land was not subject to taxation until the year 1921; that said land during the years from 1915 to 1921 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1915, and the 30th day of [39] December, 1920, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said county, paid to said Treasurer as taxes upon said homestead lands the sum of $246.25.

IV.

That after the payment of the taxes by the said Frank Whitton, as above set forth, the said Whitton did, for valuable consideration, sell, transfer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

NINETEENTH CAUSE OF ACTION:

And the plaintiff for a nineteenth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same a part of this her nineteenth cause of action.

II.

That Wm Wetzler, assignor of this plaintiff, was, during the years from 1917 to 1925 inclusive, the owner of the Northeast quarter of the Southeast quarter of Section One, Township One South, Range Two East, G. & S. R. B. & Meridian; that said Wetzler entered and filed upon the said property on October 5, 1917, and paid taxes thereon from the year 1918 to 1925 inclusive; that final certificate issued to said Wetzler on January 2, 1925; that said land was not subject to taxation until the year 1926; that said land during the years from 1918 to 1925 were a reclamation homestead and as such belonged to the United States of America. [40]

III.

That between the 1st day of January, 1917, and the 30th day of December, 1925, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said county, paid to said Treasurer as taxes upon said homestead lands the sum of $2781.31.

IV.

That after the payment of the taxes by the said Wm Wetzler, as above set forth, the said Wetzler did, for valuable consideration, sell, transfer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

TWENTIETH CAUSE OF ACTION:

And the plaintiff for a twentieth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same a part of this her twentieth cause of action.

II.

That Fred W. Bassler, assignor of this plaintiff, was, during the years from 1915 to 1930 inclusive the owner of the Northeast quarter of the Southeast quarter of Section thirty-two, Township One North, Range four East, G. & S. R. B. & Meridian; that said Bassler entered and filed upon the said property on May 15, 1915, and paid taxes thereon from the year 1915 to 1928; that final certificate issued to said Bassler on December 16, 1930; that said

[41] land was not subject to taxation until the year 1928; that said land during the years from 1915 to 1930 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1915, and the 30th day of December, 1928, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said county, paid to said Treasurer as taxes upon said homestead lands the sum of $630.24.

IV.

That after the payment of the taxes by the said Fred W. Bassler, as above set forth, the said Bassler did, for valuable consideration, sell, transfer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

TWENTY-FIRST CAUSE OF ACTION:

And the plaintiff for a twenty-first cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity

and convenience makes the same a part of this her twenty-first cause of action.

II.

That Maggie Krell, assignor of this plaintiff, was, during the years from 1917 to 1919 inclusive the owner of the Southeast [42] quarter of the Northwest quarter of Section thirty-one, Township one north, Range three east, G. & S. R. B. & Meridian; that said Maggie Krell entered and filed upon the said property on December 8, 1917, and paid taxes thereon from the year 1917 to 1919 inclusive; that final certificate issued to said Maggie Krell on August 28, 1919; that said land was not subject to taxation until the year 1920; that said land during the years from 1917 to 1920 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1917, and the 30th day of December, 1919, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said county, paid to said Treasurer as taxes upon said homestead lands the sum of $352.13.

IV.

That after the payment of the taxes by the said Maggie Krell, as above set forth, the said Maggie Krell did, for valuable consideration, sell, transfer and assign to this plaintiff all her right of action

and right, title and interest in and to said account and the taxes paid by her as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

WHEREFORE, plaintiff prays judgment against said defendant for the further sum of Seventeen Thousand Two Hundred Two and 47/100 Dollars ($17,202.47), together with interest thereon at the legal rate from the time of payment thereof until the rendition of judgment herein, together with costs and disbursements herein [43] expended, and for such other and further relief as to the court may seem just and equitable.

OLIVIA ROSEVEARE
Plaintiff

D. P. SKOUSEN
M. L. OLLERTON
Attorneys for Plaintiff.

Copy of the within received this 19th day of November, 1931.

DUDLEY W. WINDES
Attorney for defendant.

[Endorsed]: Filed Nov 19 1931 [44]

[Title of Court and Cause.]

DEFT'S SPECIAL DEMURRER TO AMENDED COMPLAINT

COMES NOW the defendant in the above entitled cause, by its counsel, and specially demurs to the amended complaint the plaintiff filed herein, upon the following grounds:

I.

The defendant specially demurs to said amended complaint and to each separate cause of action therein set forth, upon the ground and for the reason that it appears from the face of said amended complaint that each of said causes of action set out in said amended complaint, is barred by the statute of limitations of the State of Arizona, and particularly by Sec. 2059, Revised Code of Arizona, 1928, in that none of the causes of actions set forth in said amended complaint were commenced and prosecuted within two years after the same accrued.

II.

The defendant specially demurs to said amended complaint and to each separate cause of action therein set forth, upon the ground and for the reason that it appears from the face of said amended complaint that each of said causes of action set out in said amended complaint, is barred by the statute of limitations of the State of Arizona, and particularly by Sec. 2060, Revised Code of Arizona, 1928, in that none of the causes of actions set forth in

said amended complaint were commenced and prosecuted within three years after the same accrued. [45]

III.

The defendant specially demurs to said amended complaint and to each separate cause of action therein set forth, upon the ground and for the reason that it appears from the face of said amended complaint that each of said causes of action set out in said amended complaint, is barred by the statute of limitations of the State of Arizona, and particularly by Sec. 2063, Revised Code of Arizona, 1928, in that none of the causes of actions set forth in said amended complaint were commenced and prosecuted within four years after the same accrued.

WHEREFORE, defendant prays that plaintiff's amended complaint be dismissed.

Dated this 27 day of November, 1931.

DUDLEY W. WINDES
Attorney for Defendant

K. BERRY PETERSON
Attorney General
CHARLES L. STROUSS
Assistant Attorney General
Of Counsel [46]

The defendant at the hearing of this demurrer, will rely upon the authorities set forth in the Memoran-

dum Brief heretofore filed in support of defendant's special demurrers to the complaint.

DUDLEY W. WINDES
Attorney for Defendant

K. BERRY PETERSON
Attorney General
CHARLES L. STROUSS
Assistant Attorney General
Of Counsel

Received copy of the within this 27 day of November, 1931

D. P. SKOUSEN
Attorney for Pltf.

[Endorsed]: Filed Nov 27 1931 [47]

Minute Entry of
MONDAY, DECEMBER 7, 1931

October 1931 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, presiding

[Title of Cause.]

Defendant's Special Demurrers to Plaintiff's Amended Complaint come on regularly for hearing this day.

No appearance is made on behalf of the parties herein.

Whereupon, IT IS ORDERED that said Defendant's Special Demurrers to Plaintiff's Amended

Complaint be continued and reset for hearing Monday, December 14, 1931, at the hour of ten o'clock A. M. [48]

Minute Entry of
MONDAY, DECEMBER 14, 1931

October 1931 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, presiding

[Title of Cause.]

Defendant's Special Demurrers to Complaint and Defendant's Special Demurrers to Plaintiff's Amended Complaint, come on regularly for hearing this day.

D. P. Skousen, Esquire, appears as Counsel for Plaintiff, and on motion of said counsel for plaintiff,

IT IS ORDERED that M. L. Ollerton, Esquire, be entered herein as associate counsel for plaintiff.

Dudley W. Windes, Esquire, and Charles L. Strouss, Esquire, appear as counsel for the Defendant.

It appearing to the Court that said Defendant's Special Demurrers to Plaintiff's Amended Complaint supersede said Defendant's Special Demurrers to Complaint,

IT IS ORDERED that said Defendant's Special Demurrers to Complaint be stricken from the Law and Motion Calendar.

Argument on said Defendant's Special Demurrers to Plaintiff's Amended Complaint is now had by respective counsel, and

IT IS ORDERED that said Defendant's Special Demurrers to Plaintiff's Amended Complaint be submitted and by the Court taken under advisement, and that the defendant have ten days from and after this date within which to answer Plaintiff's Brief heretofore filed herein, and that Plaintiff have five days thereafter within which to Reply. [49]

Minute Entry of
THURSDAY, JANUARY 28, 1932

October 1931 Term At Phoenix

HONORABLE F. C. JOCOBS, United States District Judge, presiding

[Title of Cause.]

Defendant's Special Demurrers to Plaintiff's Amended Complaint having heretofore been argued, submitted and by the Court taken under advisement, and the Court having duly considered the same, and being fully advised in the premises,

IT IS ORDERED that said Special Demurrers to Plaintiff's Amended Complaint be, and the same are hereby overruled, and that an exception be entered on behalf of the Defendant. [50]

[Title of Court and Cause.]

ANSWER TO AMENDED COMPLAINT

COMES NOW, the defendant in the above entitled action and by way of answer to plaintiff's amended complaint, admits, denies and alleges as follows:

I.

Answering plaintiff's first, second, third, fourth, fifth, sixth, seventh, eighth, nint*n,* tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth and twenty-first causes of action, the defendant alleges that said causes of action and each and every one of them, are barred by the statute of limitations of the State of Arizona, and particularly by Section 2058, Revised Code of Arizona, 1928, in that said causes of action or either thereof were not commenced and prosecuted, and neither one thereof was commenced and prosecuted, within one year after the same accrued.

II.

Answering plaintiff's first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, and twenty-first causes of action, the defendant alleges that said causes of action and each and every one of them, are barred by the statute of limitations of the State of Arizona, and particularly by Section

2059, Revised Code of Arizona, 1928, in that said causes of action, or either thereof, were not commenced and prosecuted, and neither one thereof was commenced [51] and prosecuted within two years after the same accrued.

III.

Answering plaintiff's first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth and twenty-first causes of action, the defendant alleges that said causes of action and each and every one of them, are barred by the statute of limitations of the State of Arizona, and particularly by Section 2060, Revised Code of Arizona, 1928, in that said causes of action or either thereof, were not commenced and prosecuted, and neither one thereof was commenced and prosecuted within three years after the same accrued.

IV.

Answering plaintiff's first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth and twenty-first causes of action, the defendant alleges that said causes of action and each and every one of them, are barred by the statute of limitations of the State of Arizona, and particularly by Section 2063, Revised Code of Arizona, 1928, in that said causes of action, or either thereof, were not com-

menced and prosecuted, and neither one thereof was commenced and prosecuted within four years after the same accrued.

As a further and separate defense to plaintiff's amended complaint, the defendant denies generally and specifically, each and every material fact alleged and set up in said amended complaint, and denies each and every material fact alleged and set up in each and every separate cause of action set forth in said amended complaint.

WHEREFORE, defendant prays that plaintiff take nothing by his said causes of action, and that said amended complaint be dismissed and [52] that defendant have judgment for its costs.

Dated at Phoenix, Arizona, this 4th day of February, A.D. 1932.

DUDLEY W. WINDES
Attorney for Defendant

K. BERRY PETERSON
Attorney General
CHARLES L. STROUSS
Assistant Attorney General
Of Counsel

Copy of the within received this 4th day of February, 1932.

D. P. SKOUSEN and
M. L. OLLERTON R. R.
Attys for Plaintiff

[Endorsed]: Filed Feb 4 1932 [53]

Minute Entry of
THURSDAY, JANUARY 5, 1933

October 1932 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, presiding

[Title of Cause.]

This being the time heretofore fixed for trial setting, or other disposition, this case is now regularly called pursuant to notice to counsel. Don P. Skousen, Esquire, appears as counsel for plaintiff. No appearance is made on behalf of the defendant.

Upon motion of said counsel for plaintiff,

IT IS ORDERED that this case be, and the same is hereby stricken from the Calendar, and continued to be set. [54]

Minute Entry of
TUESDAY, JANUARY 31, 1933

October 1932 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, presiding

[Title of Cause.]

MOTION

Comes now M. L. Ollerton, one of the attorneys in the above entitled cause, and moves the court for

an order allowing this moveant to withdraw as one of the attorneys in the above entitled cause.

M. L. OLLERTON

ORDER

The court having read the foregoing motion, IT IS HEREBY ORDERED that M. L. Ollerton, one of the attorneys in the above entitled cause, may withdraw as such attorney.

Done this 31st day of January, 1933.

F. C. JACOBS
Judge of the Federal Court. [55]

[Title of Court and Cause.]

WAIVER OF JURY

Comes now Olivia Roseveare, plaintiff in the above entitled action, by her attorney, D. P. Skousen, and the County of Maricopa, Defendant in the above entitled action, by its attorney, Renz L. Jennings, and hereby waive and file this waiver to a trial by jury in the above entitled cause and request, consent and agree that the said cause may be tried before the court without a jury.

D. P. SKOUSEN
Attorney for Plaintiff
RENZ L. JENNINGS
Attorney for Defendant

[Endorsed]: Filed Feb 16 1933 [56]

Minute Entry of
MONDAY, FEBRUARY 20, 1933

October 1932 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, presiding

[Title of Cause.]

M. L. Ollerton, Esquire, and D. P. Skousen, Esquire, appear as counsel for Plaintiff. No appearance is made on behalf of the defendant.

Upon motion of D. P. Skousen, Esquire,

IT IS ORDERED that the issues herein be submitted upon agreed Statement of Facts. [57]

[Title of Court and Cause.]

AMENDED AGREED STATEMENT OF FACTS

Without waiver on the part of the defendant of its demurrers heretofore filed, and/or its exceptions to the rulings of the Court thereon, but expressly reserving and insisting upon the same, it is hereby agreed by and between Olivia Roseveare, plaintiff, D. P. Skousen, attorney for plaintiff, and the County of Maricopa, defendant, by its attorney, Renz L. Jennings, that the following statement of facts are the facts in the above entitled cause.

I.

That the plaintiff, Olivia Roseveare, is a resident of Madison, State of Wisconsin. That the plaintiff

entered upon the Southeast Quarter of Section 33, and the Southwest quarter of the Southeast quarter of Section 28, Township One North, Range Three East of [58] the G. & S. R. B. & Meridian as a homestead in 1907; that the final certificate was issued in 1919 in October; that the County of Maricopa assessed the said above described lands, beginning in the year 1911 and continued each year thereafter to and including the year 1919; that the plaintiff paid taxes beginning in 1911 and continuing each year thereafter to and including the year 1919 under an assessment levied by the County of Maricopa, State of Arizona, and after the County of Maricopa by its proper officer or officers had threatened to sue the plaintiff if she did not pay the said taxes as levied; that the plaintiff has demanded of the County of Maricopa the return of the said moneys in the sum of $1301.15 paid by her as taxes with interest thereon from the dates of payment thereof to the date of the refund by the said County.

II.

That the plaintiff, Olivia Roseveare, is the alleged assignee of a large number of similar claims to that stated in paragraph I, which claims are as follows, to-wit:

R. H. Alexander, assignor, entered and filed upon 100 acres of the Southwest quarter of Section Nine, One South, Four East of the G. & S. R. B. & Meridian, in 1910; final certificate issued August 6, 1929; taxes assessed and collected for years 1915 to 1921

inclusive in the sum of $159.62 were paid under protest during the year for which they were assessed; that demand has been made on the County of Maricopa for the return of said money so paid with interest thereon. [59]

F. W. and Maude Bassler, assignors, entered and filed upon the Northeast quarter of the Southeast quarter of Section 32, One North, Four East of the G. & S. R. B. & Meridian, May 5, 1915; final certificate issued December 16, 1930; taxes assessed and collected for years 1916 and 1917 in the sum of One Hundred Thirty-seven and 01/100 Dollars ($137.01) were paid under protest during the year for which they were assessed; that demand has been made on the County of Maricopa for the return of said money so paid with interest thereon.

Wm. S. Doner, assignor, entered and filed upon the North half of the Northeast quarter of the Southwest quarter of the Southwest quarter of Section 15, One north, Three East and the North half of the northeast quarter of the southwest quarter of the southwest quarter of Section 28, One north, Three east, of the G. & S. R. B. & Meridian, in September, 1906; final certificate issued in April, 1918; taxes assessed and collected for years 1911 to and including 1918 in the sum of One Hundred Six and 96/100 ($106.96) Dollars were paid under protest during the year for which they were assessed; that demand has been made on the County of Maricopa for the return of said money so paid with interest thereon.

E. T. Hanson and Wm. Roberson, assignors, entered and filed upon the northeast quarter of the southwest quarter of Section One, One south, Two east of the G. & S. R. B. & Meridian, January 13, 1908; final certificate issued January 19, 1920; taxes assessed and collected for 1915 to 1920 inclusive in the sum of Four Hundred Five and [60] 50/100 ($405.50) Dollars were paid under protest during the year for which they were assessed; that demand has been made on the County of Maricopa for the return of said money so paid with interest thereon.

Alex Krell, assignor, entered and filed upon the Southeast quarter of the Northwest quarter of Section 31, One north, Three east of the G. & S. R. B. & Meridian, December 8, 1917; final certificate issued August 28, 1919; taxes assessed and collected for year 1919 in the sum of One Hundred Six and 40/100 ($106.40) Dollars were paid under protest during the year for which they were assessed; that demand has been made on the County of Maricopa for the return of said money so paid with interest thereon.

Geo. Lutgerding, assignor, entered and filed upon the Southeast quarter of the Northeast quarter of Section One, One south, Two east, of the G. & S. R. B. & Meridian, December 23, 1918; final certificate issued October 11, 1921; taxes assessed and collected for years 1919 to 1921 inclusive in the sum of Five Hundred Nine and 98/100 ($509.98) Dollars were paid under protest during the year for which they were assessed; that demand has been made on

the County of Maricopa for the return of said money so paid with interest thereon.

Mabel Lutgerding, assignor, entered and filed upon the Northeast quarter of the Northeast quarter of Section One, One south, Two east, of the G. & S. R. B. & Meridian, December 23, 1918; final certificate issued June 11, 1928; taxes assessed and collected for years 1919 to 1921 inclusive in the sum of Five Hundred Eight and [61] 56/100 ($508.56) Dollars were paid under protest during the year for which they were assessed; that demand has been made on the County of Maricopa for the return of said money so paid with interest thereon.

Mrs. R. J. McDougal, assignor, entered and filed upon the Northwest quarter of the Northeast quarter of Section One, One south, Two east, of the G. & S. R. B. & Meridian, December 23, 1918; final certificate issued June 14, 1921; taxes assessed and collected for years 1919 to 1921 inclusive in the sum of Four Hundred Ninety-one and 09/100 ($491.09) Dollars were paid under protest during the year for which they were assessed; that demand has been made on the County of Maricopa for the return of said money so paid with interest thereon.

R. H. McElhany, assignor, entered and filed upon the Northeast quarter of the Southwest quarter of Section 28, One North, Three east, of the G. & S. R. B. & Meridian, in August, 1916; final certificate issued in April, 1919; taxes assessed and collected for years 1916 to 1919 inclusive in the sum of Three Hundred Forty and 57/100 ($340.57) Dollars were

paid under protest during the year for which they were assessed; that demand has been made on the County of Maricopa for the return of said money so paid with interest thereon.

Thomas J. Rice, assignor, entered and filed upon the Southwest quarter of Section 28, One north, Three east, of the G. & S. R. B. & Meridian, February 13, 1908; final certificate issued April 28, 1919; taxes assessed and collected for years 1913 to 1919 inclusive in the sum of Six [62] Hundred Eight and 55/100 ($608.55) Dollars were paid under protest during the year for which they were assessed; that demand has been made on the County of Maricopa for the return of said money so paid with interest thereon.

Mrs. Ernest T. Smith, assignor, entered and filed upon the Northwest quarter of the Southwest quarter of Section One, One south, Two east, of the G. & S. R. B. & Meridian, September 24, 1912; final certificate issued May 1, 1918; taxes assessed and collected for the year 1918 in the sum of Fifty-six and no/100 ($56.00) Dollars were paid under protest during the year for which they were assessed; that demand has been made on the County of Maricopa for the return of said money so paid with interest thereon.

W. S. Stevens, assignor, entered and filed upon the South half of the Southwest quarter of Section 28, One north, Three East, of the G. & S. R. B. & Meridian, October 15, 1908; final certificate issued April 28, 1919; taxes assessed and collected for the

years 1916 to 1919 inclusive in the sum of Four Hundred Fifty-nine and 08/100 ($459.08) were paid under protest during the year for which they were assessed; that demand has been made on the County of Maricopa for the return of said money so paid with interest thereon.

James Willis, assignor, entered and filed upon the East half of the Southeast quarter of the Northwest quarter of Section 24, One north, One east, of the G. & S. R. B. & Meridian, July 2, 1917; final certificate issued February 2, 1921; taxes assessed and collected for years 1917 and 1920 in the sum of One Hundred Seventy-three and [63] 79/100 ($173.79) Dollars were paid under protest during the year for which they were assessed; that demand has been made on the County of Maricopa for the return of said money so paid with interest thereon.

Frank E. Whitton, assignor, entered and filed upon the South half of the Southeast quarter of Section 33, One North, Three east, of the G. & S. R. B. & Meridian, in June, 1915; final certificate issued March 6, 1920; taxes assessed and collected for years 1916 to 1919 inclusive in the sum of One Hundred Twenty-six and 55/100 $126.55) Dollars were paid under protest during the year for which they were assessed; that demand has been made on the County of Maricopa for the return of said money so paid with interest thereon.

Maude Willis, assignor, entered and filed upon the West half of the Southwest quarter of Section 24, One north, One east, of the G. & S. R. B. &

Meridian, April 22, 1910; final certificate issued February 23, 1924; taxes assessed and collected for years 1919 to 1924 inclusive in the sum of Seven Hundred Eighty-one and 25/100 ($781.25) Dollars were paid under protest during the year for which they were assessed; that demand has been made on the County of Maricopa for the return of said money so paid with interest thereon.

J. R. Whitton and Arthur Trauscht, assignors, entered and filed on Lot 6, Southeast quarter of Section 33, One north, Three east, of the G. & S. R. B. & Meridian, July 26, 1918; final certificate issued December 15, 1923; taxes assessed and collected for years 1918 to 1923, inclusive in the sum of Nine Hundred Twenty-seven and 76/100 [64] ($927.76) Dollars were paid under protest during the year for which they were assessed; that demand has been made on the County of Maricopa for the return of said money so paid with interest thereon.

J. J. Fagan and Wm Wetzler, assignors, entered and filed on the Northeast quarter of the Southeast quarter of Section One, One south, Two east, of the G. & S. R. B. & Meridian, June 2, 1915, final certificate issued January 2, 1925; taxes assessed and collected for years 1915 to 1925 inclusive in the sum of Twelve Hundred Sixty-three and 24/100 ($1263.24) Dollars were paid under protest during the year for which they were assessed; that demand has been made on the County of Maricopa for the return of said money so paid with interest thereon.

Mrs. Sam F. Webb, assignor, entered and filed on

the Northeast quarter of Section 24, One north, One west, of the G. & S. R. B. & Meridian, February 21, 1906, final certificate issued May 27, 1920; taxes assessed and collected for years 1912 to 1917 inclusive in the sum of Six Hundred Twenty and 41/100 ($620.41) Dollars were paid under protest during the year for which they were assessed; that demand has been made on the County of Maricopa for the return of said money so paid with interest thereon.

Frank C. Norwood and Jesse Norwood, assignors, entered and filed on the Northeast quarter of Section 24, One north, One west, of the G. & S. R. B. & Meridian, October 19, 1917, final certificate issued May 27, 1920; taxes assessed and collected for years 1918 to 1920 inclusive in the sum of One Thousand Seven and 22/100 ($1007.22) Dollars were paid under protest during the year for which they were assessed; that demand has been made on the County of Maricopa for the return of said money so paid with interest thereon. [65]

J. F. Westberg, assignor, entered and filed on the Northwest quarter of the Southeast quarter of Section One, One south, Two east, of the G. & S. R. B. & Meridian, June 2, 1912, final certificate issued March 24, 1934; taxes assessed and collected for years 1916 to 1933 inclusive in the sum of Two Thousand Eight Hundred Thirty-three and 63/100 ($2833.63) Dollars were paid under protest during the year for which they were assessed; that demand has been made on the County of Maricopa for the return of said money so paid with interest thereon.

III.

That the total taxes paid to the County of Maricopa by the plaintiff and all of her assignors is the sum of $13,024.32; that the plaintiff has demanded of the County of Maricopa that this said sum, with interest thereon from the dates of payment thereof, be returned to the plaintiff; that the County of Maricopa has refused and still refuses to pay back to this plaintiff the said sum of $13,024.32.

D. P. SKOUSEN
Attorney for Plaintiff
RENZ JENNINGS
County Attorney
CHARLES L. STROUSS
Assistant Attorney General [66]

[Title of Court and Cause.]

STIPULATION

IT IS HEREBY STIPULATED by and between D. P. Skousen, attorney for the plaintiff in the above entitled cause, and Arthur T. LaPrade, attorney general of the State of Arizona, and Renz L. Jennings, county attorney of Maricopa County, Arizona, attorneys for and on behalf of the defendant,

That the Second Amended Complaint and the Agreed Statement of Facts, setting forth the claim of the plaintiff as the first cause of action and the assigned claims as subsequent causes of action, may

be filed without a further order of the above entitled court;

That the assignments of the various assignors to Olivia Roseveare, the plaintiff, may be filed as evidence of the transfer of the various claims.

That upon the defendant's consent to the court's rendering judgment in favor of the plaintiff on her first cause of action and including all the other subsequent causes of action in the sum of $13,024.32, the plaintiff will waive [67] and does waive all interest accruing on the said sum and sums of money paid by the plaintiff and her assignors as taxes back of the years 1931 or otherwise three years interest.

Signed this .... day of August, 1934.

D. P. SKOUSEN
Attorney for Plaintiff
RENZ JENNINGS
County Attorney

....
Attorney General

[Endorsed]: Filed Sep 17 1934 [68]

Minute Entry of
TUESDAY, SEPTEMBER 18, 1934

March 1934 Term At *Prescott*

HONORABLE F. C. JACOBS, United States District Judge, presiding

[Title of Cause.]

Pursuant to Stipulation heretofore filed herein,

IT IS ORDERED that Plaintiff be permitted to file Second Amended Complaint in accordance with said stipulation. [69]

[Title of Court and Cause.]

SECOND AMENDED COMPLAINT

COMES NOW the plaintiff by her attorney, D. P. Skousen, and for cause of action against the defendant, alleges:

FIRST CAUSE OF ACTION:

I.

That the plaintiff is a resident of Madison, State of Wisconsin; that the defendant is now, and at all times hereinafter mentioned, was a municipal corporation and a body politic corporate, and one of the legal divisions of the State of Arizona, to wit, one of the Counties in which the State of Arizona has been, and is divided.

II.

That this is an action at law brought to recover taxes illegally assessed and collected upon United States homestead lands, filed upon and entered by the plaintiff and various sundry other persons hereinafter named, by the County of Maricopa, State of Arizona.

III.

That this action involves Clause One (1) Section Two (2), and Clause Two (2) Section Three (3) Article Four (4) of the United States Constitution, and Section One (1) of the Fourteenth [70] (14) Amendment thereof, and Clauses One and Eighteen (18) Section Eight (8) Article One (1) and Paragraph Two (2) Article Six (6) of said United States Constitution; and laws enacted by the Congress of the United States in pursuance of said constitutional provisions relating to the disposition and sale of public lands, and defining the rights, privileges, and immunities of homesteaders deriving title from the United States Government; and involves also the right of the County of Maricopa to appropriate property of homesteaders on United States Public Lands without due process of law, and the denial to said homesteaders of the equal protection of the law, and the construction, application and enforcement of the Statutes of the State of Arizona in contravention of the Constitution and laws of the United States.

IV.

That on or about the year 1872, the land and premises hereinafter described as being in Maricopa County, State of Arizona, then the Territory of Arizona, became subject to entry under the public land laws of the United States, and among others subject to entry under the General Homestead Law

as provided by the Act of May 20, 1862, and Act amendatory thereof and supplementary thereto.

That under and by virtue of said Act of May 20, 1862, and acts amendatory thereof and supplementary thereto, the Secretary of the Interior Department of the United States Government was and is authorized to perform any and all acts, and to make such rules and regulations as may be necessary or proper for the purpose of carrying out the provisions of said Acts.

That pursuant to said authority the Secretary of the Interior prescribed rules and regulations relating to homestead entries under said general homestead law under the title of "Suggestions to Homesteaders and persons desiring to make Homestead [71] Entries", which said regulations are hereby referred to and made part hereof as fully and to all intents and purposes as if incorporated herein.

That said Acts, rules and regulations provide, among other things:

That every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the Naturalization Laws, shall be entitled to enter one quarter section or a less quantity of unappropriated public lands, to be selected in and be in conformity with the legal subdivisions of the public lan*sd,* by applying to enter said lands and making and subscribing before a proper officer and in a proper land office of the United States an affi-

davit showing that he or she is qualified to make said entry.

Every person making a homestead entry under said public land laws and regulations is required, among other things, to establish a residence upon the tract of land entered within six months after the date of entry, and maintain a residence thereon for a period of not less than three years, and to cultivate said land for a period of at least two years; to submit final proof within five or seven years from date of entry as to residence, cultivation and improvements, first giving notice of the time and place for submission of final proof, as required by laws and regulations.

V.

That thereafter the said public land laws were further amended and supplemented by the Act of June 17, 1902, commonly known as the "Reclamation Act."

That said Reclamation Act, and Acts amendatory thereof and supplementary thereto, provided for the withdrawal of public lands [72] from all forms of entry except under homestead laws, and except when subject to the provisions, limitations, charges, terms and conditions of said Reclamation Act and acts amendatory thereof and supplementary thereto.

That under and by virtue of said Reclamation Act and acts amendatory thereof and supplementary thereto, the Secretary of the Interior was and is authorized to perform any and all acts and to make

such rules and regulations as may be necessary or proper for the carrying out of the provisions of said acts.

That pursuant to said authority the Secretary of the Interior, upon the passage of said acts, prescribed rules and regulations relating to reclamation homestead entries within reclamation projects of the United States in a general circular known as "General Reclamation Circular", which said regulations are referred to and made part hereof as fully and to all intents and purposes as if incorporated herein.

That under said Reclamation Act and amendments and supplements thereto, and the rules and regulations prescribed thereunder, the Secretary of the Interior Department of the United States Government is authorized and empowered to determine the area of lands for which one person may obtain title under said Acts and regulations in each and every reclamation project.

That said entry is subject to re-adjustment by said Secretary of the Interior, and that said Secretary of the Interior is not required to confine any Farm Unit established by him to the limits of any entry theretofore made, but may combine any legal subdivision thereof with any contiguous tract lying outside of said entry.

That homestead entrymen within reclamation projects are precluded from making final proof and from receiving final certificate or patent until said Secretary of the Interior shall have [73] deter-

mined the Farm Unit for such reclamation project.

That each homestead entryman under said reclamation act is required to confirm his entry to such Farm Unit as may be established by the said Secretary of the Interior.

That in addition to the acts and things required of homestead entrymen under the General Homestead Law, homestead entrymen of lands lying in irrigation projects are required to clear the land, entered by or assigned to them, of brush, trees and other incumbrances, to provide the same with sufficient laterals for its effective irrigation, to grade the same and put it in proper condition for irrigation and crop growth, to plant, irrigate and cultivate during at least two years next preceding the time of filing the Final Affidavit, hereinafter mentioned, at least one-half of the irrigable area of his entry, and to grow satisfactory crops thereon.

That under said reclamation acts and the regulations no final certificate can be issued until the doing of all the things enumerated under said acts and regulations, particularly the acts and things herein mentioned.

That in addition to the proof required under the general homestead laws of the United States, homestead entrymen upon homesteads within any reclamation project are required, as appears from said acts and regulations and Form of Notice of acceptance of Proof of Homestead residence issued by the U. S. Land Office officials, to submit to the United States Land Office, in which such reclamation project is located, an affidavit, corroborated by

two witnesses, showing that the land entered by him, or assigned to him, has been cleared of brush, trees, and other incumbrances, provided with sufficient laterals for its effective irrigation, graded and otherwise put in proper condition for irrigation and crop growth, planted, irrigated and cultivated, and [74] during at least two years next preceding the date of the filing of final affidavit that satisfactory crops have been grown on at least one-half of the irrigable area thereof.

That said entryman is further required, before the issuance of final certificate, to pay to the Land Office Officials of the proper land office the sum of $1.50 for each legal subdivision included in each farm unit, together with all water charges due thereon.

That upon the compliance with the requirements of said reclamation acts and regulations, final certificate is issued to said reclamation homestead entry-*k*an or assigns, reserving a lien to the United States Government for charges due for the irrigation works supplying said irrigation project with water, and that thereafter patent for said land issued to such entryman or assigns containing like reservations of a lien to the United States Government.

VI.

That on the 17th day of July, 1902, the Secretary of the Interior withdrew the lands and premises hereinafter described as lying and being in Maricopa County, State of Arizona, from all entries

except homestead entries under the Act of June 17, 1902, and acts amendatory thereof and supplementary thereto, and the regulations promulgated thereunder.

VII.

That thereafter, to wit, on the 25th day of June, 1904, said lands were incorporated in that certain reclamation project established under and by virtue of said Act of June 17, 1902, and acts amendatory thereof and supplementary thereto, and designated the "Salt River Project".

VIII.

That on the 14th day of February, 1912, the Territory of [75] Arizona was admitted into the Federal Union by Enabling Act approved June 20, 1910, whereby the lands and property belonging to the United States of America, or reserved for its use, were exempted from taxation.

IX.

That on the 18th day of January, 1917, the Secretary of the Interior Department of the United States Government established the area which might be included in any one entry or farm unit within the said Salt River Project at forty (40) acres.

X.

That on the said 18th day of January, 1917, the Secretary of the Interior Department of the United States Government established Farm Units within

the Salt River Valley under said Reclamation Act of June 17, 1902, and the regulations issued thereunder, and ordered and required all homestead entrymen within two years from the date thereof to conform their entry to such Farm Unit.

XI.

That this plaintiff and the different persons, assignors of this plaintiff, whose names are entered and set forth in the plaintiff's Additional Causes of Action, made entry of the various tracts of land described in plaintiff's said additional causes of action and insofar as required at said times and under the then existing circumstances and regulations, fully and truly in every particular complied with the requirements of said general homestead laws and said reclamation homestead laws and made entries for the respective tracts set out and described in the plaintiff's said additional causes of action, and proofs regarding the same, and assignments thereof upon the date set forth as will hereafter more fully appear, made and executed assignments of their various causes of action for valuable consideration to this plaintiff. [76]

XII.

That previous to the making and acceptance of final proof, and the payment of the moneys due the Federal Government, and the issuance of final certificate thereof, the said premises of this plaintiff and each and all the premises described in plaintiff's said additional causes of action, and each and all

thereof, under the Constitution and laws of the United States, were the property of the said United States of America, and were exempt from taxation by the State of Arizona, and all municipalities thereof.

XIII.

That after the incorporation of said lands within the Salt River Project, to wit, the 25th day of June, 1904, and the establishment of said lands as reclamation homestead entries, to wit, during the years from 1911 to and including 1933, and before the issuance of final certificate or patent to the plaintiff herein for her said land, and before the issuance of final certificate or patent to the plaintiff's assignors set out in said additional causes of action, the County authorities of Maricopa County, State of Arizona, (then the Territory of Arizona), assessed said lands of this plaintiff and all of said lands described in plaintiff's said additional causes of action for the State and County taxes for said County, Territory and State aforesaid, and thereafter the Board of Supervisors of said County and State levied taxes against the lands of this plaintiff and each and all of the various tracts of land described in plaintiff's said additional causes of action, and in the amounts and sums in said additional causes of action shown, which taxes were duly entered upon the public tax records of said County and State, and officially declared a lien upon said lands as in cases of assessments and levies upon

and against other lands individually and privately owned by others than the United States or homestead entrymen. [77]

XIV.

That thereafter each year from 1911 during the continuance of the Territorial status of said State of Arizona, and following the admission of said Territory as a State into the Federal Union up to and including 1933, said County and State authorities annually assessed and levied taxes against said premises for each and every one of said years; that said taxes were thereafter duly entered upon the public tax records of Maricopa County, State of Arizona, and by said authorities, in manner and form for the assessment and taxing of real property according to the Statutes of Arizona, officially declared to be a first lien upon said lands.

XV.

That the Statutes of the State of Arizona relating to the assessment, levy and collection of taxes including Chapter 75, Article 5, Revised Statutes of the State of Arizona, 1928, and amendments thereof and supplements thereto, applied, construed and enforced by the taxing officials of said State of Arizona and said County of Maricopa, are hereby referred to and made part hereof as though fully incorporated herein. That said Revenue Statutes of said State of Arizona provide, inter alia, particularly Paragraph 3136 of said Chapter 75, Article 7, page 732, 1928 Revised Statutes of Arizona, that

no person shall be permitted for any reason to test the validity of any tax assessed unless the amount of such tax shall have first been paid to the official whose duty it is to collect the same, together with all penalties and costs, but that after payment an action may be maintained to recover any tax illegally collected.

XVI.

That said Revenue Statutes of the State of Arizona further provide, inter alia, for the attachment, accumulation, operation and enforcement of great and onerous and cumulative penalties, [78] fees, interest and compound interest and charges against each and every taxpayer for his failure to pay taxes assessed as the same became due, which penalties, interests, charges and expenses must be paid at the time of payment of said tax originally assessed and become a lien against the property assessed in the same manner as the said original tax.

XVII.

That by reason of the premises aforesaid, the said officials of Maricopa County, including the County Assessors and County Treasurer thereof, in each and all of said years herein mentioned, claimed, alleged and declared that there was legally due and owing from this plaintiff and the various persons whose names are set forth in plaintiff's said additional causes of action, as and for taxes assessed for said years hereinbefore mentioned upon

said additional causes of action, the various sums and each and all thereof in said additional causes of action mentioned, for and as taxes alleged by said officials of said county to have been duly and legally assessed and levied against the various premises in said additional causes of action, described, and which sums and each and all thereof the County Treasurer claimed to be due from this plaintiff and each and all of said plaintiff's assignors to the County of Maricopa and State of Arizona.

That during each and all of said years, to wit, 1911 to 1933 inclusive, as aforesaid, despite the fact, as aforesaid, that final proof had not been made thereon, and despite the fact that no affidavit of proof of reclamation, improvement and irrigation relating thereto had been made, or fees paid thereon, and despite the fact than no final certificate had been issued therefor, the said County of Maricopa, acting in this regard by its duly elected officials, at all times herein required, requested, demanded and insisted upon payment, by this plaintiff and each and all of the [79] persons whose names are set forth in plaintiff's said additional causes of action, of the taxes so assessed and levied against the said premises and all thereof, described, as aforesaid, in plaintiff's said additional causes of action.

XVIII.

That this plaintiff and the various persons whose names are set forth in plaintiff's additional causes

of action at all times herein mentioned protested and objected to the taxation of their respective tracts of land for the reason that title to the same was still in the United States Government and that said County taxing authorities were without power or authority to tax lands of the character of homestead lands for which final certificate had not been issued.

That this plaintiff and the various persons whose names are set forth in said additional causes of action and many others united in forming an association to object and protest against the taxation of said lands and that they and each and all of them individually and collectively protested and objected to the assessment of their lands and the levying and collection of taxes thereon.

XIX.

That notwithstanding the protesting and objecting of this plaintiff and said various persons whose names are set forth in plaintiff's additional causes of action, the said County of Maricopa demanded that the said taxes levied as aforesaid, together with all penalties, interest and charges be paid upon said respective tracts of land, and threatened to sell the lands of this plaintiff and the lands of said various other persons for said taxes, interest and penalties; and threatened to dispossess this plaintiff and said various other persons from their respective tracts of land.

That said County of Maricopa through its duly elected officials instituted a great number of suits

for the collection of [80] taxes assessed against homesteads lands similarly situated, and brought various and numerous onerous and annoying suits against the members of said taxpayers association and the various persons whose names are set forth in said additional causes of action to enforce the levy of said taxes and to collect the same; and by public announcements, publications, declarations and proclamations announced and declared that said County of Maricopa proposed to collect each and all of said taxes and to sell each and all of said premises and to dispossess each and all of said homestead entrymen unless said taxes were paid.

XX.

That on the 12th day of December, 1919, an action was filed by one William Irwin, plaintiff, v. Vernon Wright, defendant, the latter being the treasurer and tax collector of Maricopa County, State of Arizona, and which suit was carried to the United States Supreme Court, said suit being reported in 258 United States Reports, page 219. The Supreme Court of the United States held in the said suit that the taxes so levied, assessed and collected were done so illegally; that the said suit as filed and the appeal thereof and the decision of the United States Supreme Court are made a part hereof by specific reference and are incorporated herein as if set out as a part of this complaint.

XXI.

That while the suit referred to in the preceding paragraph was being prosecuted and carried up through the various courts of the United States to the Supreme Court of the United States, the County of Maricopa, by its officers and officials, continued to collect taxes on lands that the final certificates had not yet been issued to and filed and brought many onerous, expensive and annoying suits against homestead entrymen in the Salt River Project for the collection of taxes. [81]

XXII.

That said taxes were not voluntarily paid, but on the contrary the payment of said taxes was involuntary and under protest and objection, and was paid to prevent the dispossession of this plaintiff by said County, and the consequent interference with her compliance with the United States Homestead law, to prevent a sale of her said premises and a cloud upon her title, to prevent the accumulation of great and onerous penalties and interest; that the collecting of said taxes by said County produced serious consequences and irreparable injuries to this plaintiff and her property rights; to prevent a seizure of her property and additional irreparable injury, and that said payment was made under duress, coercion and intimidation; that the same methods were used to enforce payment from, and the same injuries suffered by each of the assignors in the additional causes of action of this plaintiff.

XXIII.

That the assessing, levying and collecting of said taxes was made arbitrarily and without due process of law, and in denial of the equal protection of the law and the rights, privileges and immunities of this plaintiff and her said assignors holding said land as homesteaders and under the homestead laws of the United States, and in contravention of the constitution and laws of the United States.

That said County of Maricopa, though often requested to so do, has failed and neglected and refused and still refuses to repay this plaintiff said taxes so paid to said County Treasurer; that said refusal to repay said taxes is without any authority, equity, justice or law, and that said funds so paid as taxes are due to this plaintiff from said defendant ex aequo et bono. [82]

XXIV.

That this plaintiff is now, and at all times herein mentioned, was, the owner of the Southeast Quarter of Section 33, and the Southwest quarter of the Southeast quarter of Section 28, Township One North, Range Three East of the G. & S. R. B. & Meridian, which said premises were then and there a reclamation homestead for which final certificate had not been issued and was then and there the property of the United States of America. That the final certificate was not issued to this plaintiff on her said land until the 20th day of October, 1919, and the final certificate was issued to each of the

assignors of this plaintiff on the date or dates set out in the said additional causes of action.

XXV.

That between the 1st day of January, 1911, and the 30th day of December, 1919, this plaintiff, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said County, paid to said Treasurer as taxes upon said homestead land the sum of $1301.15,

WHEREFORE, plaintiff prays judgment against said defendant for the sum of $1301.15, together with interest thereon at the legal rate from the time of payment thereof until the rendition of judgment herein, together with costs and disbursements herein expended, and for such other and further relief as to the court may seem just and equitable.

D. P. SKOUSEN,
Attorney for Plaintiff. [83]

COMES NOW the plaintiff by her attorney, D. P. Skousen, and for additional causes of action against the defendant, alleges:

SECOND CAUSE OF ACTION:

I.

This plaintiff reiterates the statements and allegations and facts set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same part of this, her second cause of action.

II.

That R. H. Alexander, assignor of this plaintiff, was, during the years from 1915 to 1918 inclusive, the owner of 100 acres of the Southwest quarter of Section Nine, One South, Four East of the G. & S. R. B. & Meridian; that the said Alexander entered and filed upon the said property in 1910, and paid taxes thereon from 1915 to 1921 inclusive; that final certificate was issued to the said Alexander on August 6, 1929. That said land was not subject to taxation until the year 1930; that the said lands during the years from 1910 to 1930 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1915, and the 30th day of December, 1921, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said County, paid to said Treasurer as taxes upon said homestead land the sum of $159.62.

IV.

That after the payment of the taxes by the said Alexander as above set forth, the said Alexander did, for valuable consideration, sell, transfer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to the bringing of this action this plaintiff de-

manded repayment of said taxes [84] so paid to said county of Maricopa, but that said County refused and still refuses to repay the same or any part thereof.

THIRD CAUSE OF ACTION:

And the plaintiff for a third cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same part of this, her third cause of action.

II.

That F. W. and Maude Bassler, assignors of this plaintiff, were, during the years from 1915 to 1930 inclusive the owner of the Northeast quarter of the Southeast quarter of Section 32, One North, Four East of the G. & S. R. B. & Meridian; that said Basslers entered and filed upon the said property on May 15, 1915, and paid taxes thereon for the years 1916 and 1917; that final certificate issued to said Basslers on December 16, 1930; that said land was not subject to taxation until the year 1931; that said land during the years from 1915 to 1930 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1916, and the 30th day of December 1917, these assignors,

upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said county, paid to said Treasurer as taxes upon said homestead lands the sum of $137.01.

IV.

That after the payment of the taxes by the said F. W. and Maude Bassler, as above set forth, the said Basslers did, for valuable consideration, sell, transfer and assign to this [85] plaintiff all their right of action and right, title and interest in and to said account and the taxes paid by them as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

FOURTH CAUSE OF ACTION:

And the plaintiff for a fourth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same part of this, her fourth cause of action.

II.

That Wm S. Doner, assignor of this plaintiff, was, during *the from* 1911 to 1918 inclusive, the owner of the North half of the Northeast quarter of the Southwest quarter of the Southwest quarter

of Section 15, One north, Three East, and the North half of the Northeast quarter of the Southwest quarter of the Southwest quarter of Section 28, One north, Three east, of the G. & S. R. B. & Meridian; that the said Doner entered and filed upon the said property on the 26th day of September, 1906, and paid taxes thereon from the year 1911 to 1918 inclusive; that said Doner paid the aggregate sum of $106.96 taxes during those said years. That final certificate was issued to the said Doner in April of 1919; that said land was not subject to taxation until the year 1920; that the said lands during the years from 1911 to 1920 were a reclamation homestead and as such belonged to the United States of America. [86]

III.

That between the 1st day of January, 1911, and the 30th day of December, 1918, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said County, paid to said Treasurer as taxes upon said homestead land the sum of $106.96.

IV.

That after the payment of the taxes by the said Doner, as above set forth, the said Doner did, for valuable consideration, sell, transfer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to

the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

FIFTH CAUSE OF ACTION:

And the plaintiff for a fifth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same part of this, her fift*y* cause of action.

II.

That E. T. Hanson and Wm Roberson, assignors of this plaintiff, were, during the years from 1908 to 1920 inclusive, the owners of the Northeast quarter of the Southwest quarter of Section One, One south, Two east of the G. & S. R. B. & Meridian; that Wm Roberson entered and filed upon the said property on the 13th day of January, 1908, and paid taxes thereon for the years 1915 and 1916; that said Roberson assigned to E. T. Hanson on the 2nd day of May, 1917; that said Hanson paid taxes thereon from the year [87] 1917 to 1920 inclusive; that said Roberson and Hanson paid the aggregate sum of $405.50 taxes during those said years. That final certificate was issued to the said Hanson on January 19, 1920. That said land was not subject to taxation until the year 1921; that the said lands during the years from 1908 to 1920 were a reclamation homestead and as

such belonged to the United States of America.

III.

That between the 1st day of January, 1915, and the 30th day of December, 1920, these assignors, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said County, paid to said Treasurer as taxes upon said homestead land the sum of $405.50.

IV.

That after the payment of the taxes by the said Roberson and Hanson as above set forth, the said Roberson and Hanson, for valuable consideration, did sell, transfer and assign to this plaintiff all their right of action and right, title and interest in and to said account and the taxes paid by them as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said County refused and still refuses to repay the same or any part thereof.

SIXTH CAUSE OF ACTION:

And the plaintiff for a sixth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same part of this, her sixth cause of action. [88]

II.

That Alex Krell, assignor of this plaintiff, was, during the years from 1917 to 1919 inclusive the owner of the Southeast quarter of the Northwest quarter of Section 31, One north, Three East of the G. & S. R. B. & Meridian; that said Alex Krell entered and filed upon the said property on December 8, 1917, and paid taxes thereon from the year 1917 to 1919 inclusive; that final certificate issued to said Krell on August 28, 1919; that said land was not subject to taxation until the year 1920; that said lands during the years from 1917 to 1920 were reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1917, and the 30th day of December, 1919, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said county, paid to said Treasurer as taxes upon said homestead lands the sum of $106.40.

IV.

That after the payment of the taxes by the said Alex Krell, as above set forth, the said Krell did, for valuable consideration, sell, transfer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to the bringing of this action this plaintiff demanded

repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

SEVENTH CAUSE OF ACTION:

And the plaintiff for a seventh cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity [89] and convenience makes the same a part of this her seventh cause of action.

II.

That Geo. Lutgerding, assignor of this plaintiff, was, during the years 1918 to 1921 inclusive, the owner of the Southeast quarter of the Northeast quarter of Section One, One South, Two East of the G. & S. R. B. & Meridian; that the said Lutgerding entered and filed upon the said property on the 23rd day of December, 1918, and paid taxes thereon from the year 1918 to 1921 inclusive; that final certificate was issued to said Lutgerding on the 11th day of October, 1921. That said land was not subject [illegible] taxation until the year 1922; that the said lands during the years from 1918 to 1921 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1918, and the 30th day of December, 1921, this assignor,

upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said County, paid to said Treasurer as taxes upon said homestead land the sum of $509.98.

IV.

That after the payment of the taxes by the said Lutgerding, as above set forth, the said Lutgerding did, for valuable consideration, sell, transfer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof. [90]

EIGHTH CAUSE OF ACTION:

And the plaintiff for an eighth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same part of this, her eighth cause of action.

II.

That Mabel Lutgerding, assignor of this plaintiff, was, during the years 1918 to 1923 inclusive, the owner of the Northeast quarter of the Northeast quarter of Section One, One South, Two East of

the G. & S. R. B. & Meridian; that the said Mabel Lutgerding entered and filed upon the said property on the 23rd day of December, 1918, and paid taxes thereon from the year 1918 to 1923 inclusive; that said Mabel Lutgerding assigned to Mary Beck on October 22, 1923; that said land was not subject to taxation until the year 1928; that the said lands during the years from 1918 to 1923 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1918, and the 30th day of December, 1923, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said County, paid to said Treasurer as taxes upon said homestead land the sum of $508.56.

IV.

That after the payment of the taxes by the said Mabel Lutgerding, as above set forth, the said Lutgerding did, for valuable consideration, sell, transfer and assign to this plaintiff all her right of action and right, title and interest in and to said account and the taxes paid by her as aforesaid; that [91] previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said County refused and still refuses to repay the same or any part thereof.

NINTH CAUSE OF ACTION:

And the plaintiff for a ninth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from pararaph I to XXIII inclusive, and for purpose of brevity and convenience makes the same part of this, her ninth cause of action.

II.

That Mrs. R. J. McDougall, assignor of this plaintiff, was, during the years 1918 to 1921 inclusive, the owner of the Northwest quarter of the Northeast quarter of Section One, One South, Two East of the G. & S. R. B. & Meridian; that the said Mrs. McDougall entered and filed upon the said property on the 23rd day of December, 1918, and paid taxes thereon from the year 1919 to 1921 inclusive; that said Mrs. R. J. McDougall received the final certificate to said land on June 14, 1921; that said land was not subject to taxation until the year 1922; that the said lands during the years from 1918 to 1922 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1919, and the 30th day of December, 1921, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer

of said County, paid to said Treasurer as taxes upon said homestead land the sum of $491.09.

IV.

That after the payment of the taxes by the said Mrs. R. J. [92] McDougall, as above set forth, the said Mrs. McDougall did, for valuable consideration, sell, transfer and assign to this plaintiff all her right of action and right, title and interest in and to said account and the taxes paid by her as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said County refused and still refuses to repay the same or any part thereof.

TENTH CAUSE OF ACTION:

And the plaintiff for a tenth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same part of this, her tenth cause of action.

II.

That Thomas J. Rice, assignor of this plaintiff, was, during the years 1908 to 1919 inclusive, the owner of the Southwest quarter of Section 28, One north, Three east of the G. & S. R. B. & Meridian; that the said Rice entered and filed upon the said property on the 13th day of February,

1908, and paid taxes thereon from the year 1913 to 1919 inclusive; that the final certificate was issued to said Rice on the 28th day of April, 1919; that said land was not subject to taxation until the year 1920; that the said lands during the years from 1908 to 1919 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1913, and the 30th day of December, 1919, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer [93] of said County, paid to said Treasurer as taxes upon said homestead lands the sum of $608.55.

IV.

That after the payment of the taxes by the said Thomas J. Rice, as above set forth, the said Rice did, for valuable consideration, sell, transfer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

ELEVENTH CAUSE OF ACTION:

And the plaintiff for an eleventh cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same part of this her eleventh cause of action.

II.

That Mrs. Ernest T. Smith, assignor of this plaintiff, was, during the years from 1912 to 1918 inclusive, the owner of the Northwest quarter of the Southwest quarter of Section One, One South, Three East of the G. & S. R. B. & Meridian; that the said Smith entered and filed upon the said property on the 24th day of September, 1912, and paid taxes thereon for the year 1918; that final certificate was issued to said Mrs. Smith on May 1, 1918; that said land was not subject to taxation until the year 1919; that said lands during the years from 1912 to 1919 were a reclamation homestead and as such belonged to the United States of America. [94]

III.

That between the 1st day of January, 1918, and the 30th day of December, 1918, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said county, paid to said Treasurer as taxes upon said homestead lands the sum of $56.00.

IV.

That after the payment of the taxes by the said Mrs. Ernest T. Smith, as above set forth, the said Mrs. Smith did, for valuable consideration sell transfer and assign to this plaintiff all her right of action and right, title and interest in and to said account and the taxes paid by her as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

TWELFTH CAUSE OF ACTION:

And the plaintiff for a twelfth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same part of this her twelfth cause of action.

II.

That W. S. Stevens, assignor of this plaintiff, was, during the years from 1908 to 1919 inclusive, the owner of the South half of the Southwest quarter of Section 28, One north, Three east of the G. & S. R. B. & Meridian; that the said Stevens entered and filed upon the said property on October 15, 1908, and paid taxes thereon from the year 1916 to 1919 inclusive; that final certificate was issued

to said Stevens on April 28, 1919; that said land [95] was not subject to taxation until the year 1920; that said lands during the years from 1908 to 1920 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1916, and the 30th day of December, 1919, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said county, paid to said Treasurer as taxes upon said homestead lands the sum of $459.08.

IV.

That after the payment of the taxes by the said W. S. Stevens, as above set forth, the said Stevens did, for valuable consideration, sell, transfer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

THIRTEENTH CAUSE OF ACTION:

And the plaintiff for a thirteenth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the

plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same a part of this her thirteenth cause of action.

II.

That R. H. McElhaney, assignor of this plaintiff, was, during the years from 1916 to 1919 inclusive, the owner of the Northeast quarter of the Southwest quarter of Section 28, One north, Three east of the G. & S. R. B. & Meridian; that the said McElhaney [96] entered and filed upon the said property in August, 1916, and paid taxes thereon from the year 1916 to 1919 inclusive; that final certificate was issued to said McElhaney in April, 1919; that said land was not subject to taxation until *the* 1920; that said lands during the years from 1916 to 1919 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1916, and the 30th day of December, 1919, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said county, paid to said Treasurer as taxes upon said homestead lands the sum of $340.57.

IV.

That after the payment of the taxes by the said R. H. McElhaney, as above set forth, the said McElhaney did, for valuable consideration, sell, trans-

fer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

FOURTEENTH CAUSE OF ACTION:

And the plaintiff for a fourteenth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same a part of this her fourteenth cause of action. [97]

II.

That James Willis, assignor of this plaintiff, was, during the years from 1917 to 1921 inclusive, the owner of the East half of the Southeast quarter of the Northwest quarter of Section 24, One north, One east of the G. & S. R. B. & Meridian; that the said Willis entered and filed upon the said property on July 2, 1917, and paid taxes thereon for the years 1917 and 1920; that final certificate was issued to said Willis on February 24, 1921; that said land was not subject to taxation until the year 1922; that said lands during the years from 1917 to 1922 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1917, and the 30th day of December, 1920, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said county, paid to said Treasurer as taxes upon said homestead lands the sum of $173.79.

IV.

That after the payment of the taxes by the said James Willis, as above set forth, the said Willis did, for valuable consideration, sell, transfer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

FIFTEENTH CAUSE OF ACTION:

And the plaintiff for a fifteenth cause of action against the defendant alleges and reiterates all of the facts, statements [98] and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same a part of this her fifteenth cause of action.

II.

That Frank E. Whitton, assignor of this plaintiff, was, during the years from 1915 to 1920, inclusive,

the owner of the South half of the Southeast quarter of Section 33, One north, Three east, of the G. & S. R. B. & Meridian; that said Whitton entered and filed upon the said property in June, 1915, and paid taxes thereon from the year 1916 to 1919 inclusive; that final certificate was issued to said Whitton on March 6, 1920; that said land was not subject to taxation until the year 1921; that said land during the years from 1915 to 1921 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1916, and the 30th day of December, 1919, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said county, paid to said Treasurer as taxes upon said homestead lands the sum of $126.55.

IV.

That after the payment of the taxes by the said Frank E. Whitton as above set forth, the said Whitton did, for valuable consideration, sell, transfer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof. [99]

SIXTEENTH CAUSE OF ACTION:

And the plaintiff for a sixteenth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same a part of this her sixteenth cause of action.

II.

That J. R. Whitton and Arthur Trauscht, assignors of this plaintiff, were, during the years from 1918 to 1923 inclusive, the owners of Lot Six, Southeast quarter of Section 33, One North, Three east of the G. & S. R. B. & Meridian; that said Whitton entered and filed upon the said property on July 26, 1918, and paid taxes thereon from the year 1918 to 1921 inclusive; that said Whitton assigned to Arthur Trauscht November 28, 1922; that said Trauscht paid taxes thereon for the years 1922 and 1923; that said Whitton and Trauscht paid the aggregate sum of $927.76 taxes during those years; that final certificate issued December 15, 1923. That said land was not subject to taxation until the year 1924; that said lands during the years from 1918 to 1924 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1918, and the 30th day of December, 1923, these assignors, upon demand of the taxing authorities of Maricopa

County, State of Arizona, including the Treasurer of said county, paid to said Treasurer as taxes upon said homestead lands the sum of $927.76.

IV.

That after the payment of the taxes by the said Whitton and Trauscht, as above set forth, the said Whitton and Trauscht, for valuable consideration, did sell, transfer and assign to this [100] plaintiff all their right of action and right, title and interest in and to said account and the taxes paid by them as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

SEVENTEENTH CAUSE OF ACTION:

And the plaintiff for a seventeenth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same a part of this her seventeenth cause of action.

II.

That Mrs. Sam F. Webb, assignor of this plaintiff, was, during the years from 1906 to 1920 inclusive, the owner of the Northeast quarter of Section 24, One north, One west, of the G. & S. R. B. & Meridian; that said Mrs. Sam F. Webb entered and

filed upon the said property February 21, 1906, and paid taxes thereon from the year 1912 to 1917 inclusive; that final certificate was issued May 27, 1920; that said land was not subject to taxation until the year 1921; that said land during the years from 1906 to 1921 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1912, and the 30th day of December, 1917, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said county, paid to said Treasurer as taxes upon said homestead lands the sum of $620.41. [101]

IV.

That after the payment of the taxes by the said Mrs. Sam F. Webb, as above set forth, the said Mrs. Webb did, for valuable consideration, sell, transfer and assign to this plaintiff all her right of action and right, title and interest in and to said account and the taxes paid by her as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

EIGHTEENTH CAUSE OF ACTION:

And the plaintiff for an eighteenth cause of action against the defendant alleges and reiterates all

of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same a part of this her eighteenth cause of action.

II.

That Maude Willis, assignor of this plaintiff, was, during the years from 1910 to 1924 inclusive, the owner of the West half of the Southwest quarter of Section 24, One north, One East, of the G. & S. R. B. & Meridian; that said Maude Willis entered and filed upon the said property on April 22, 1910, and paid taxes thereon from the year 1919 to 1924 inclusive; that final certificate was issued to said Maude Willis on February 23, 1924; that said land was not subject to taxation until the year 1925; that said lands during the years from 1910 to 1925 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1919, and the 30th day of December, 1924, this assignor, upon demand of the taxing [102] authorities of Maricopa County, State of Arizona, including the Treasurer of said county, paid to said Treasurer as taxes upon said homestead lands the sum of $781.25.

IV.

That after the payment of the taxes by the said Maude Willis, as above set forth, the said Maude

Willis did, for valuable consideration, sell, transfer and assign to this plaintiff all her right of action and right, title and interest in and to said account and the taxes paid by her as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

NINETEENTH CAUSE OF ACTION:

And the plaintiff for a nineteenth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same a part of this her nineteenth cause of action.

II.

That Frank C. and Jesse Norwood, assignors of this plaintiff were, during the years from 1917 to 1920 inclusive, the owners of the Northeast quarter of Section 24, One north, One west, of the G. & S. R. B. & Meridian; that said Norwoods entered and filed upon the said property on October 19, 1917, and paid taxes thereon from the year 1918 to 1920 inclusive; that final certificate issued to said Norwoods on May 27, 1920; that said land was not subject to taxation until the year 1921; that said land during the years from 1918 to 1921 were a recla-

mation homestead and as such [103] belonged to the United States of America.

III.

That between the 1st day of January, 1918, and the 30th day of December, 1920, these assignors, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said county, paid to said Treasurer as taxes upon said homestead lands the sum of $1007.22.

IV.

That after the payment of the taxes by the said Norwoods, as above set forth, the said Norwoods did, for valuable consideration, sell, transfer and assign to this plaintiff all their right of action and right, title and interest in and to said account and the taxes paid by them as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

TWENTIETH CAUSE OF ACTION:

And the plaintiff for a twentieth cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of brevity and convenience makes the same a part of this her twentieth cause of action.

II.

That Wm Wetzler and J. J. Fagan, assignors of this plaintiff, were, during the years from 1915 to 1925 inclusive, the owners of the Northeast quarter of the Southeast quarter of Section One, One South, Two east of the G. & S. R. B. & Meridian; that the said Fagan entered and filed upon the said property on the 2nd day of [104] June, 1915, and paid taxes thereon from the year 1915 to 1917 inclusive; that said Fagan assigned to Wm Wetzler on October 5, 1917; that said Wetzler paid taxes thereon from the year 1918 to 1925 inclusive; that said Fagan and Wetzler paid the aggregate sum of $1263.24 during those said years; that final certificate issued to said Wetzler on January 2, 1925; that said land was not subject to taxation until the year 1926; that said lands during the years from 1915 to 1926 were a reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1915, and the 30th day of December, 1925, these assignors, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said county, paid to said Treasurer as taxes upon said homestead lands the sum of $1263.24.

IV.

That after the payment of the taxes by the said J. J. Fagan and Wm Wetzler, as above set forth,

the said Fagan and Wetzler, for valuable consideration, did sell, transfer and assign to this plaintiff all their right of action and right, title and interest in and to said account and the taxes paid by them as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

TWENTY-FIRST CAUSE OF ACTION:

And the plaintiff for a twenty-first cause of action against the defendant alleges and reiterates all of the facts, statements and allegations set forth in the plaintiff's first cause of action from paragraph I to XXIII inclusive, and for purpose of [105] brevity and convenience makes the same a part of this her twenty-first cause of action.

II.

That J. F. Westberg, assignor of this plaintiff, was, during the years 1912 to 1934 inclusive, the owner of the Northwest quarter of the Southeast quarter of Section One, One south, Two east, of the G. & S. R. B. & Meridian; that said Westberg entered and filed upon the said property on June 2, 1912, and paid taxes thereon from the year 1916 to 1933 inclusive; that final certificate issued to said Westberg on March 24, 1934; that said land was not subject to taxation until the year 1935; that said land during the years from 1912 to 1935 were a

reclamation homestead and as such belonged to the United States of America.

III.

That between the 1st day of January, 1916, and the 30th day of December, 1933, this assignor, upon demand of the taxing authorities of Maricopa County, State of Arizona, including the Treasurer of said county, paid to said Treasurer as taxes upon said homestead lands the sum of $2833.63.

IV.

That after the payment of the taxes by the said J. F. Westberg, as above set forth, the said Westberg did, for valuable consideration, sell, transfer and assign to this plaintiff all his right of action and right, title and interest in and to said account and the taxes paid by him as aforesaid; that previous to the bringing of this action this plaintiff demanded repayment of said taxes so paid to said county of Maricopa, but that said county refused and still refuses to repay the same or any part thereof.

WHEREFORE, plaintiff prays judgment against said defendant for the further sum of $11,723.17, together with interest thereon [106] at the legal rate from the time of payment thereof until the rendition of judgment herein, together with costs

and disbursements herein expended, and for such other and further relief as to the court may seem just and equitable.

D. P. SKOUSEN
Attorney for Plaintiff

Copy received Aug. 27, 1934

M. L. OLLERTON
Deputy County Attorney

Copy received this 27th day of August, 1934.

CHARLES L. STROUSS
Assistant Attorney General

[Endorsed]: Filed Sep 18 1934 [107]

Minute Entry of
MONDAY, SEPTEMBER 24, 1934

April 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, presiding

[Title of Cause.]

Plaintiff's Motion to Set Cause for Hearing, comes on regularly for hearing this day.

No counsel appearing for the parties herein,

IT IS ORDERED that said Motion be continued and reset for hearing Monday, October 1, 1934, at the hour of ten o'clock, A. M. [108]

Minute Entry of
MONDAY, OCTOBER 1, 1934

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, presiding

[Title of Cause.]

Plaintiff's Motion to Set Cause for Hearing, comes on regularly for hearing this day.

D. P. Skousen, Esquire, appears as counsel for Plaintiff. No appearance is made on behalf of Defendants.

Said counsel for Plaintiff states that counsel for Defendants have consented to have this cause heard at the Court's convenience, and

IT IS ORDERED that this cause be set for hearing Tuesday, October 16, 1934, at the hour of ten o'clock, A.M. [109]

Minute Entry of
TUESDAY, OCTOBER 16, 1934

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, presiding.

[Title of Cause.]

This cause comes on regularly for trial this day, before the Court, sitting without a Jury, a Jury having been expressly waived upon the written

stipulation of counsel heretofore filed herein, pursuant to Amended Agreed Statement of Facts, heretofore filed herein.

D. P. Skousen, Esquire, appears as counsel for Plaintiff.

Arthur T. LaPrade, Esquire, Attorney General of the State of Arizona, by R. H. Cornelius, Esquire, Assistant Attorney General of the State of Arizona, appears as counsel for Defendant.

Both sides announce ready for trial.

Counsel for Plaintiff now makes a statement of the case to the Court.

Whereupon, the following oral and documentary evidence is introduced:

PLAINTIFF'S CASE:

The plaintiff, Olivia Roseveare, is now duly sworn and examined in her own behalf.

Upon stipulation of counsel,

IT IS ORDERED that Plaintiff's Exhibit Number one, [110] Twenty-one (21) Assignments of Tax Claims, be admitted in evidence.

Thereupon, the Plaintiff rests.

Whereupon, defendant renews Special Demurrers to Plaintiff's Amended Complaint, and excepts to the Order of the Court heretofore entered herein, overruling said Demurrers.

And the Defendant rests.

Both sides rest.

Said cause is submitted to the Court, and the

Court having duly considered the same, and being fully advised in the premises,

IT IS ORDERED that Judgment be entered for Plaintiff as prayed for in Plaintiff's Complaint, and that counsel for Plaintiff prepare Judgment.

[111]

Minute Entry of
TUESDAY, OCTOBER 16, 1934

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, presiding

L-812

OLIVIA ROSEVEARE,

Plaintiff,

vs.

THE COUNTY OF MARICOPA, STATE OF ARIZONA,

Defendant.

JUDGMENT.

This cause came on regularly for trial on the 16th day of October, 1934, the plaintiff appearing in person and by her counsel, D. P. Skousen, and the defendant appearing by M. L. Ollerton, deputy county attorney, for Renz L. Jennings, county attorney, and by R. H. Cornelius, deputy attorney general, for Arthur T. LaPrade, attorney general. A trial by jury having been expressly waived in writ-

ing by the respective parties, the cause was tried before the court sitting without a jury; whereupon an agreed statement of facts was filed; the plaintiff was sworn and examined, and documentary evidence being closed, the cause was submitted to the court for consideration and decision. After due deliberation thereon the court finds that the plaintiff is entitled to the recoveries and remedies prayed for; wherefore, by reason of the premises:

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, Olivia Roseveare, do have and recover of and from the defendant, the County of Maricopa, State of Arizona, the sum of $13024.32 principal, together with the sum of $2944.38 interest, together with his costs and disbursements herein taxed and allowed in the sum of $27.30, being a total sum of [112] $15,996.00, together with interest thereon at the rate of six (6%) per cent per annum from October 16, 1934, until paid; and that such process as may be necessary and proper for the collection and enjoyment of this judgment, issue for the benefit of said plaintiff.

Judgment entered by the clerk by order of Judge Jacobs on October 16, 1934.

Approved as to form this 16th day of October, 1934.

RENZ L. JENNINGS
By M. L. OLLERTON
County Attorney
R. H. CORNELIUS
Asst. Attorney general. [113]

[Title of Court and Cause.]

PETITION FOR APPEAL

To the Honorable F. C. Jacobs, Judge of the District Court, aforesaid;

COMES NOW the County of Maricopa, State of Arizona, by and through its Attorneys, and respectfully shows that on the 16th day of October, 1934, the Court made and entered its final judgment against petitioner and in favor of Plaintiff, Olivia Roseveare.

The said action is one wherein the Plaintiff is seeking to recover from the Defendant upon the ground that the Plaintiff and certain assignors of the Plaintiff paid to the Defendant taxes levied by the Defendant, which said taxes the Plaintiff claims to have been illegally levied and collected; and the case is one in which under the legislation in force when the act of January 31, 1928, was passed, a review could be had on writ of error.

Your petitioner, feeling aggrieved by the said judgment entered as aforesaid, herewith petitions the Court for an order allowing it to appeal from said judgment to the Circuit Court of Appeals of the United States, for the Ninth Circuit, under the laws of the United States in such cases made and provided for the reasons specified in the assignment of errors filed herewith.

WHEREFORE, premises considered, your petitioner prays that a writ of error do issue, and that the Court make and enter its order that an appeal

in this behalf to the U. S. Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, [114] in said circuit, for the correction of the errors complained of, and herewith assigned, be allowed and that an order be made fixing the amount of security to be given by Plaintiff in Error conditioned as the law directs, and upon giving such security as may be required, that all further proceedings may be suspended until determination of said appeal by said circuit court of appeals.

DATED this 14th day of January, 1935, at Phoenix, Arizona.

HARRY J. JOHNSON
County Attorney of Maricopa County,
Attorney for Defendant.
EARL ANDERSON
By E. G. FRAZIER
Deputy County Attorney.
JOHN L. SULLIVAN
Attorney General
Of Counsel for Defendant.
By DUDLEY W. WINDES
Assistant Attorney General.

Received copy hereof this 14th day of January, 1935

D. P. SKOUSEN
Attorney for Plaintiff.

[Endorsed]: Filed Jan 14 1935 [115]

[Title of Court and Cause.]

ASSIGNMENT OF ERROR

COMES NOW the County of Maricopa, State of Arizona, Plaintiff, in the above entitled cause, and in connection with its petition for writ of error and appeal in this cause, assigns the following errors which plaintiff in error avers occurred on the trial thereof and upon which it relies to reverse the judgment herein, as appears of record;

I.

That the Court erred in overruling the special demurrer to the Complaint and Amended Complaint filed in this cause for the reason that it appears upon the face of said complaint and amended complaint, upon which the judgment herein is based, that each of the causes of action set out in said amended complaint is barred by the Statute of Limitations of the State of Arizona and particularly by Section 2059, Revised Code of Arizona, 1928, which said section provides, among other things, that an action for the detention of personal property and conversion of the same, shall be brought within two years after said cause of action accrues; and it appears from the face of said complaint and amended complaint that each of said causes of action accrued more than two years prior to the Commencement of this Action.

II.

That the Court erred in overruling the special demurrer to the Complaint and amended complaint

filed in this cause for the [116] reason that it appears upon the face of said complaint and amended complaint, upon which the judgment herein is based, that each of the causes of action set out in said amended complaint is barred by the Statute of Limitations of the State of Arizona, and particularly by Section 2060, Revised Code of Arizona, 1928, which said section provides that an action upon an indebtedness, not evidenced by a contract in writing, shall be brought within three years after the cause of action shall have accrued, and it appears that from said complaint and amended complaint that all of said causes of action herein accrued more than three years prior to the commencement of this action.

III.

That the Court erred in overruling the special demurrer to the Complaint and Amended Complaint filed in this cause for the reason that it appears upon the face of said complaint and amended complaint, upon which the judgment herein is based, that each of the causes of action set out in said amended complaint is barred by the Statute of Limitations of the State of Arizona, and particularly by Section #2063, Revised Code of Arizona, 1928, which said section provides that all actions other than for recovery of real property, for which no other limitation is otherwise prescribed, shall be brought within four years next after the same shall have accrued; and it appears from the face of

said complaint and amended complaint, that each of the causes of action therein set forth, accrued more than four years prior to the commencement of this action.

IV.

That the Court erred in rendering the judgment herein for the reason that the same appears to have been based upon an agreed statement of facts, and it appears in said agreed statement of facts that each of the causes of action set forth in the complaint and amended complaint is barred by the Statute of Limitations, and particularly by the provisions of said Sections 2059, 2060 and 2063, [117] Revised Code of Arizona, 1928; in that it appears in said agreed statement of facts that each of said causes of action sued on herein accrued more than four years prior to commencement of this action.

WHEREFORE plaintiff in error prays that the judgment of said Court be reversed; that judg-

ment be entered dismissing complaint and awarding plaintiff in error its costs herein.

Dated at Phoenix, Arizona, this 14th day of January, 1935.

HARRY JOHNSON
Attorney for Plaintiff in Error.
CARL ANDERSON
By E. G. FRAZIER
Deputies
JOHN L. SULLIVAN
Attorney General
Of Counsel
By DUDLEY W. WINDES
Assistant Attorney General

Received copy hereof this 14th day of January, 1935

D. P. SKOUSEN
Attorney for Plff.

[Endorsed]: Filed Jan 14 1935 [118]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL

It appearing that the Defendant in the above entitled cause has filed in this Court a petition for an appeal from the final judgment herein dated October 16, 1934, together with an assignment of error and prayer for reversal,

It is hereby ordered that an appeal, as prayed for in said petition be and it is hereby allowed, and

the bond on appeal, condition as required by law, is hereby fixed at the sum of five hundred Dollars, and said bond shall operate as a cost bond.

Dated this 15th day of January, 1935, at Phoenix, Arizona.

F. C. JACOBS
Judge of Said Court.

Received copy hereof this 14'' day of January 1935

D. P. SKOUSEN
Attorney for Plaintiff

[Endorsed]: Filed Jan 15 1935 [119]

[Title of Court and Cause.]

BOND ON APPEAL

Know All Men by these Presents:

That we, the County of Maricopa, State of Arizona, as principal, and UNITED STATES FIDELITY AND GUARANTY COMPANY, as surety, are held and firmly bound unto the plaintiff herein, Olivia Roseveare, her heirs, executors and administrators, in the sum of Five Hundred and no/100 Dollars, to be paid to the said Olivia Roseveare, her heirs, executors, administrators and assigns to which payment well and truly to be made we bind ourselves, our assigns and successors, jointly and severally, by these presents.

Sealed with *out* seals and dated this 15th day *os* January, in the year of our Lord, 1935.

WHEREAS, lately at the October term, A. D. 1934, of the United States District Court, for the District of Arizona, in a suit pending in said Court between Olivia Roseveare, plaintiff, and the County of Maricopa, State of Arizona, defendant, No. L-812-Phx, judgment was rendered against the said defendant in the sum of Fifteen thousand nine hundred and ninety-six ($15,996) Dollars and the said County of Maricopa, State of Arizona, defendant, has obtained an appeal from said Court to reverse the judgment in the aforesaid suit and a citation directed to said Olivia Roseveare, plaintiff, citing and admonishing her to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, California, thirty days from and after [120] the date of said citation.

Now, the condition of the above obligation is such that if the said, the County of Maricopa, State of Arizona, shall prosecute said appeal to effect and answer for and pay all costs herein if it fails to

make good its plea, then the above obligation to be void, else to remain in full force and virtue.

[Seal] COUNTY OF MARICOPA,
STATE OF ARIZONA
Principal, Defendant
By C. W. PETERSON
Chairman, Board of Supervisors, Mar. Co.

Attest:

J. E. DeSOUZA
Clerk, Board of Supervisors, Maricopa County, Arizona.

[Seal] UNITED STATES FIDELITY AND GUARANTY COMPANY
Surety

[Seal] By GROVER C. SUGGS
Its Attorney-in-Fact

The foregoing bond is approved both as to sufficiency and form and is allowed as a cost bond on this 18th day of January, 1935.

F. C. JACOBS
Judge of said Court.

Received copy hereof this 16'' day of January, 1935

D. P. SKOUSEN RR
Attorney for Plaintiff

[Endorsed]: Filed Jan 18 1935 [121]

Minute Entry of
FRIDAY, JANUARY 18, 1935

October 1934 Term At Phoenix

HONORABLE F. C. JACOBS, United States District Judge, presiding

[Title of Cause.]

Comes now the Defendant by its counsel, Earl Anderson, Esquire, Deputy County Attorney for the County of Maricopa, State of Arizona, and presents to the Court its bond on appeal executed on the 15th day of January, 1935, in the sum of Five Hundred Dollars ($500.00), with United States Fidelity and Guaranty Company, as surety thereon, and

IT IS ORDERED that said bond be and the same is hereby accepted and approved. [122]

[Title of Court and Cause.]

PRAECIPE FOR PAPERS TO BE INCLUDED IN TRANSCRIPT ON APPEAL

To The Clerk of the Court Above-named:

You will please prepare a transcript on appeal in the above-entitled cause incorporating therein the hereinafter designated papers, documents and records and when you have prepared and certified thereto, forward the same to the Clerk of the United

States Circuit Court of Appeal for the Ninth Circuit at San Francisco, California.

The papers, records and documents to be included in said transcript are as follows:

First Amended Complaint,
Demurrers to First Amended Complaint,
Answer to Amended Complaint,
Second Amended Complaint,
Agreed Statement of Facts,
Copy of all Minute Entries and Orders,
Waiver of Jury,
Final Judgment,
Petition for Appeal,
Assignment of Errors,
Order Allowing Appeal,
Citation on Appeal,
Bond on Appeal, and
This Praecipe.

DATED this 15" day of January, 1935.

HARRY JOHNSON
County Attorney of Maricopa County,
Attorney for Defendant.
EARL ANDERSON
By E. G. FRAZIER
Deputy County Attorney.
JOHN L. SULLIVAN
Attorney General
Of Counsel for Defendant
By DUDLEY W. WINDES
Assistant Attorney General [123]

Received copy hereof this 16th day of January, 1935

D. P. SKOUSEN R.R.
Attorney for Plaintiff

[Endorsed]: Filed Jan 16 1935 [124]

[Title of Court and Cause.]

AMENDED PRAECIPE FOR PAPERS TO BE INCLUDED IN TRANSCRIPT ON APPEAL

To the Clerk of the Court above-named:

You will please prepare a transcript on appeal in the above-entitled cause incorporating therein the hereinafter designated papers, documents and records and when you have prepared and certified thereto, forward the same to the Clerk of the United States Circuit Court of Appeal for the Ninth Circuit at San Francisco, California.

The papers, records and documents to be included in said transcript are as follows:

First Amended Complaint,
Demurrers to First Amended Complaint,
Answer to Amended Complaint,
Second Amended Complaint,
Agreed Statement of Facts, Filed Sept. 17, 1934,
Copy of all Minute Entries and Orders,
Waiver of Jury,
Final Judgment,
Petition for Appeal,
Assignment of Errors,

Order Allowing Appeal,
Citation on Appeal,
Bond on Appeal, and
Amended Praecipe for papers on appeal.

DATED this 26th day of January, 1935.

HARRY JOHNSON,
County Attorney of Maricopa County, Attorney for Defendant.
EARL ANDERSON,
By E. G. FRAZIER,
Deputy County Attorney.
JOHN SULLIVAN,
Attorney General
Of Counsel for Defendant.
By DUDLEY W. WINDES,
Assistant Attorney General [125]

Received copy hereof this 26th day of January, 1935.

D. P. SKOUSEN, RR.
Attorney for Plaintiff.

[Endorsed]: Filed Jan 26 1935. [126]

In the United States District Court
For the District of Arizona

CLERK'S CERTIFICATE
TO TRANSCRIPT OF RECORD

United States of America,
District of Arizona.—ss.

I, J. Lee Baker, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Olivia Roseveare, Plaintiff, vs. The County of Maricopa, State of Arizona, Defendant, numbered L-812-Phoenix on the docket of said Court.

I further certify that the attached pages, numbered 1 to 129, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon called for and designated in the praecipe filed in said cause and made a part of the transcript attached hereto, as the same appear from the original of records and on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of $22.15, and that said sum has been paid to me by counsel for the appellant.

I further certify that the original citation issued

in the said cause is hereto attached and made a part of this record.

WITNESS my hand and the Seal of the said Court this 5th day of February, 1935.

[Seal] J. LEE BAKER,
Clerk. [127]

[Title of Court and Cause.]

CITATION ON APPEAL

To the above-named plaintiff and her attorney of record:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, at the City of San Francisco, California, thirty days from and after this citation bears date, pursuant to appeal on file in the Clerk's office of the District Court of the United States for the District of Arizona, wherein the County of Maricopa, State of Arizona, is appellant, and Olivia Roseveare is appellee to show cause, if any there be, why the judgment rendered against the said defendant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Fred C. Jacobs, Judge of the District Court of the United States for the District of Arizona, this 15th day of January, 1935.

[Seal] F. C. JACOBS,
Judge of the District Court *ot* the United States for the District of Arizona. [128]

Received copy hereof and due service of the within citation accepted and admitted this 16th day of January 1935

D. P. SKOUSEN R.R.
Attorney for Plaintiff

[Endorsed]: Filed Jan. 16, 1935. [129]

[Endorsed]: No. 7766. United States Circuit Court of Appeals for the Ninth Circuit. The County of Maricopa, State of Arizona, Appellant, vs. Olivia Roseveare, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed February 7, 1935.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

7

No. 7766

United States
Circuit Court of Appeals
For the Ninth Circuit

THE COUNTY OF MARICOPA, STATE OF ARIZONA,

Appellant.

vs.

OLIVIA ROSEVEARE,

Appellee.

APPELLANT'S BRIEF

Upon Appeal from the United States District Court for the District of Arizona.

HARRY JOHNSON,
County Attorney,
Maricopa County, Arizona.

E. G. FRAZIER,
EARL ANDERSON,
Deputies,
Attorneys for Appellants.

JOHN L. SULLIVAN,
Attorney General,

DUDLEY W. WINDES,
Assistant Attorney General,
Of Counsel.

FILED

JUN 10 1935

PAUL P. O'BRIEN,

No. 7766

United States
Circuit Court of Appeals
For the Ninth Circuit

THE COUNTY OF MARICOPA, STATE OF ARIZONA,
Appellant.

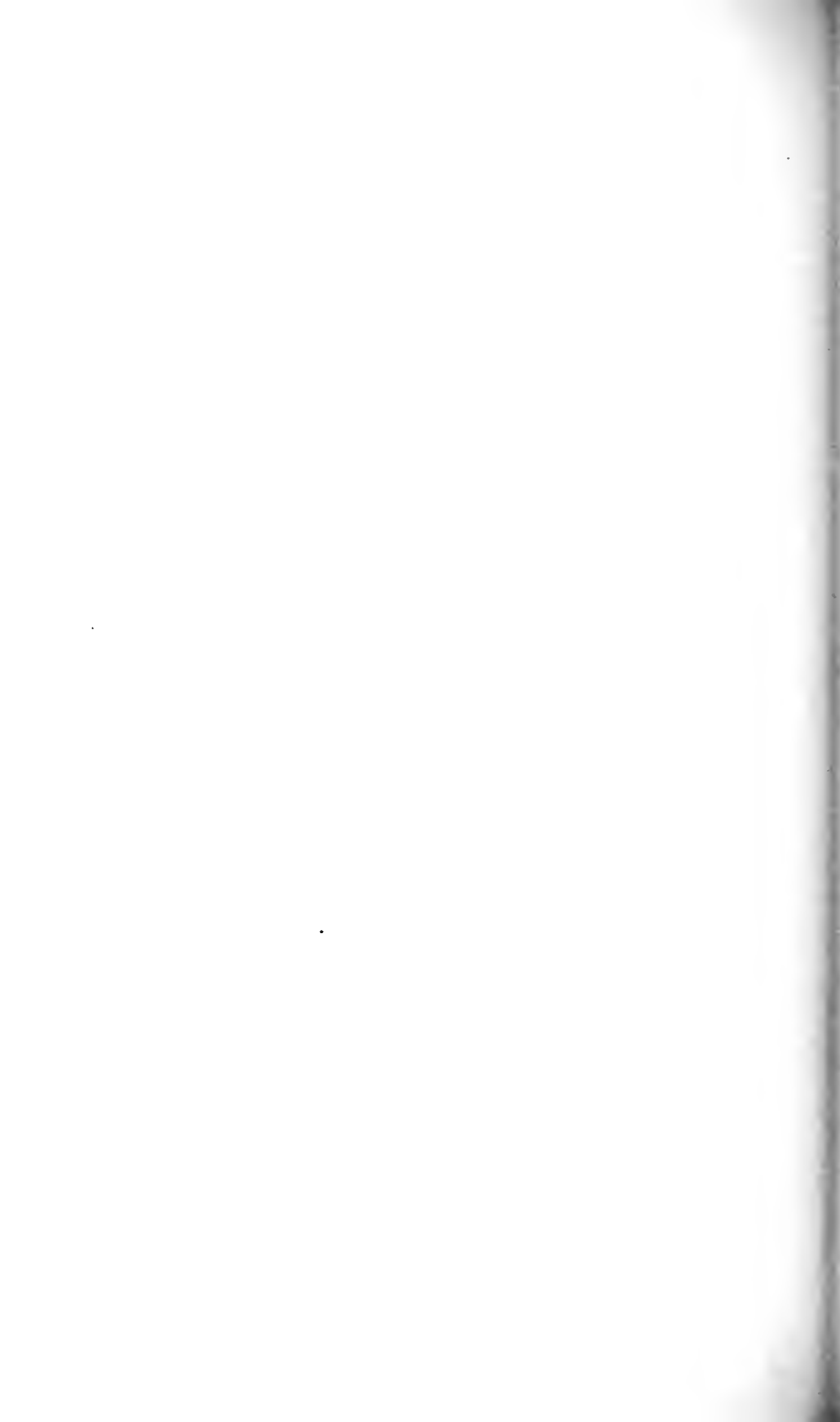
vs.

OLIVIA ROSEVEARE,
Appellee.

APPELLANT'S BRIEF

Upon Appeal from the United States District Court for the District of Arizona.

HARRY JOHNSON,
County Attorney,
Maricopa County, Arizona.
E. G. FRAZIER,
EARL ANDERSON,
Deputies,
Attorneys for Appellants.
JOHN L. SULLIVAN,
Attorney General,
DUDLEY W. WINDES,
Assistant Attorney General,
Of Counsel.



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No. 7766

United States Circuit Court of Appeals

For the Ninth Circuit

THE COUNTY OF MARICOPA, STATE OF ARIZONA,

Appellant.

vs.

OLIVIA ROSEVEARE,

Appellee.

APPELLANT'S BRIEF

STATEMENT OF THE CASE

In 1931 appellee instituted this action in the United States District Court, for the District of Arizona, to recover from appellant money alleged to have been illegally collected by appellant, as and for taxes on certain lands owned by the appellee and her assignors. The complaint alleged that all the money for which a recovery was sought was paid to and received by the appellant more than six years prior to the filing of the action.

Appellant demurred to the complaint on the ground that appellee's several causes of action, if she ever had any, were barred by the statutes of limitation. Appellant also pleaded limitation and a general denial as a defense to appellee's action. The demurrers were

overruled and the case was submitted to the Court without a jury on an agreed statement of facts, and judgment was rendered for appellee for the amount of taxes paid and interest thereon, from which judgment the appellant appeals. The only question before this Court is the correctness of the Court's ruling in overruling the appellant's demurrers raising the defense of limitations and rendering judgment for the amount sued for despite the appellant's plea of limitation.

The original complaint was amended October 19, 1931, the amendment increasing the amount sued for in the original complaint something like One thousand ($1000.00) Dollars, and set out in twenty-one separate counts the several causes of action previously joined in two counts in the original complaint. (Tr. pages 4-52)

To the first amended complaint, the defendant demurred: First, that plaintiff's causes of action were not prosecuted within two years after the same accrued as required by Section 2059, of the Revised Code of Arizona, 1928. Second, that plaintiff's causes of action were not prosecuted within three years after the same accrued as required by Section 2060, of the Code. Third, that plaintiff's causes of action were not prosecuted within four years after the same accrued as required by Section 2063 of the Code. (Tr. 53-54)

The demurrers were overruled and exception taken by appellant. (Tr. page 57)

The appellant answered and plead as a defense the one, two, three and four year statutes of limitation and a general denial of all the allegations of appellee's amended complaint. (Tr. 58-60)

On September 18, 1934, appellee filed a second amended complaint upon which complaint the case was tried. (Tr. 74-121) The second amended complaint did not materially change the legal effect of the first amended complaint. The appellant's demurrers were urged against the second amended complaint and were overruled and an exception taken to the Court's ruling. (Tr. 123)

The second amended complaint alleged, in addition to the jurisdictional facts, that the appellee and her assignors had entered upon several tracts of land of the public domain of the United States, under the United States Reclamation Homestead Act (Act, June 7, 1902), that while appellee and her assignors held such lands, and prior to the issuance of final certificate and patent, the taxing officials of appellant levied, assessed and enforced the collection of taxes on and against said lands, and that appellee and her assignors paid said taxes under protest. That all of said taxes were paid prior to 1925 with the exception of the taxes on one tract of land, described in the twenty-first cause of action (Tr. 119 and 120) which taxes the appellee alleges were paid between January 1, 1916, and the 30th day of December, 1933.

Appellant did not have a right to collect the taxes alleged to have been paid. The United States Supreme

Court, in the case of Irvin vs. Wright, reported in 258 U. S. p. 219 (March 20, 1922) decided that lands so held were not taxable.

The agreed statement of facts filed in the case (Tr. 63-72) stipulates that the several sums of money mentioned in each count of the complaint was paid to the appellant during the period mentioned in each count of the complaint; that such taxes were not paid until after the appellant had threatened to sue to enforce collection of the taxes. The agreed statement of facts also set forth the several amounts paid by appellee and her assignors.

If the appellant could rely on the Statute of limitation as a defense to this action, then appellee was not entitled to recover anything on twenty counts of the amended complaint and only a portion of the amount set forth in the twenty-first cause of action. If the statutes of limitation are not available as a defense to this action, then the appellee is entitled to recover the amounts sued for.

Several statutes of limitation were set up as a defense to the action, however we believe the four year statute, Section 2063 of the Revised Code of Arizona, 1928, applies.

SPECIFICATION OF THE ERRORS RELIED UPON

I.

The Court erred in overruling the special demurrer to the Complaint and Amended Complaint filed in this cause for the reason that it

appears upon the face of said complaint and amended complaint, upon which the judgment herein is based, that each of the causes of action set out in said amended complaint is barred by the Statute of Limitations of the State of Arizona and particularly by Section 2059, Revised Code of Arizona, 1928, which said section provides, among other things, that an action for the detention of personal property and conversion of the same, shall be brought within two years after said cause of action accrues; and it appears from the face of said complaint and amended complaint that each of said causes of action accrued more than two years prior to the Commencement of this Action.

II.

The Court erred in overruling the special demurrer to the complaint and amended complaint filed in this cause for the reason that it appears upon the face of said complaint and amended complaint, upon which the judgment herein is based, that each of the causes of action set out in said amended complaint is barred by the Statute of Limitations of the State of Arizona, and particularly by Section 2060, Revised Code of Arizona, 1928, which said section provides that an action upon an indebtedness, not evidenced by a contract in writing, shall be brought within three years after the cause of action shall have accrued, and it appears that from said complaint and amended complaint that all of said causes

of action herein accrued more than three years prior to the commencement of this action.

III.

The Court erred in overruling the special demurrer to the Complaint and Amended Complaint filed in this cause for the reason that it appears upon the face of said complaint and amended complaint, upon which the judgment herein is based, that each of the causes of action set out in said amended complaint is barred by the Statute of Limitations of the State of Arizona, and particularly by Section 2063, Revised Code of Arizona, 1928, which said section provides that all actions other than for recovery of real property, for which no other limitation is otherwise prescribed, shall be brought within four years next after the same shall have accrued; and it appears from the face of said complaint and amended complaint, that each of the causes of action therein set forth, accrued more than four years prior to the commencement of this action.

IV.

The Court erred in rendering the judgment herein for the reason that the same appears to have been based upon an agreed statement of facts, and it appears in said agreed statement of facts that each of the causes of action set forth in the complaint and amended complaint is barred by the Statute of Limitations, and par-

ticularly by the provisions of said Sections 2059, 2060 and 2063, Revised Code of Arizona, 1928; in that it appears in said agreed statement of facts that each of said causes of action sued on herein accrued more than four years prior to commencement of this action.

ARGUMENT AND AUTHORITIES IN SUPPORT OF THE SPECIFICATIONS OF ERROR

This is a statutory action brought under the provisions of Section 3136, Revised Code of Arizona, 1928, and is an action at law in the nature of an action for money had and received. Said section reads as follows:

> "*Tax not to be contested unless paid; collection may not be enjoined.* No person upon whom a tax has been imposed under any law relating to taxation shall be permitted to test the validity thereof, either as plaintiff or defendant, unless such tax shall first have been paid to the proper county treasurer, together with all penalties thereon. No injunction shall ever issue in any action or proceeding in any court against this state, or against any county, municipality, or officer thereof, to prevent or enjoin the collection of any tax levied. After payment an action may be maintained to recover any tax illegally collected, and if the tax due shall be determined to be less than the amount paid, the excess shall be refunded in the manner hereinbefore provided."

The several statutes of limitation pleaded by appellant as a defense to this action are as follows:

> "Sec. 2059. *Two year limitation.* There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, the following action, for: 1. Injuries done to the person of another; 2. trespass for injury done to the estate or the property of another; 3. detaining the personal property of another and for converting such personal property to one's own use; 4. taking or carrying away the goods and chattels of another; 5. injuries done to the person of another where death ensued from such injuries, which action shall be considered as having accrued at the death of the party injured."

> "Sec. 2060. *Three year limitations.* There shall be commenced and prosecuted within three years after the cause of action shall have accrued, and not afterward, the following actions: 1. Debt where the indebtedness is not evidenced by a contract in writing; 2. upon stated or open accounts other than such mutual and current accounts as concern the trade of merchandise between merchant and merchant, their factors or agents; provided, that no item thereof shall have been incurred within three years immediately prior to the commencement of any action thereon; 3. for relief on the ground of fraud or mistake, which cause of action shall not be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

"Sec. 2063. *General limitation.* Actions other than for the recovery of real property, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same has accrued, and not afterward."

A CAUSE OF ACTION ACCRUED IN FAVOR OF APPELLEE ON THE DATE OF PAYMENT OF THE TAX, AND LIMITATION BEGIN TO RUN ON THAT DATE.

A demand or claim for the repayment of the tax is not a condition precedent to bringing an action for the recovery of taxes illegally collected. Arizona Eastern Railway Company vs. Graham County, 20 Ariz. 257, 179 Pac. 959. In Western Ranches vs. Custer County, 89 Fed. 577 (C. C. Mont.) the court, speaking of a Montana statute similar to said section 3136, said the statute giving a remedy to sue for taxes illegally collected was a special remedy provided by law and the presentation of a claim to the County Board was not a condition precedent to the bringing of a suit. The Court said a condition not named in a statute is not required. See also Birch vs. Orange County, 186 Cal. 736, 200 Pac. 647, and 61 C. J. pp. 998-9.

As a cause of action accrued in favor of the appellee and her assignors at the time of the payment of the taxes to the County, and a demand for the repayment was unnecessary, the statute of limitation begin to run against appellee's and her assignors' claims on the dates of payment.

In United States vs. Southern Surety Co., 9 Fed. (2d) 664, the Court said:

> "Where a cause of action arises in favor of the person paying the taxes not legally due to the County, the limitation begins to run from the date of payment."

In Centenial Eureka Mining Co. vs. Jaub County, 22 Utah 395; 62 Pac. 1024, the court used this language:

> "When a party pays an unlawful tax under protest a cause of action under provisions of Sec. 180 at once accrues in favor of such party to recover such tax and the statute of limitations begins to run from the date of payment."

In Callanan vs. County of Madison, 45 Ia. 561, the Court held that a cause of action for the recovery of money from a County which was alleged to have been paid as and for taxes illegally collected, accrued in favor of the taxpayer at the very moment of payment and an action to recover such taxes was barred, if suit was not brought within the period of limitation after the date of payment.

Spinning vs. Pierce County, 20 Wash. 126; 54 Pac. 1006, was brought to recover from the County certain fees illegally collected by the Sheriff from a litigant and paid to the County by the Sheriff. The County interposed a defense of the statutes of limitation and the court held that limitation begin to run

against the plaintiff's claim from the date of the payment of the fees to the officer and that the plaintiff's cause of action was barred by the statutes of limitation because it was not commenced within the period of limitation.

In Morton vs. City of Nevada, 41 Fed. 582 (C. C. Mo.), an action was commenced to recover money paid to the City by a purchaser of bonds, which bonds were later declared invalid by the Court. The City pleaded the statutes of limitation as a defense to the action; the Court held that the cause of action accrued at the time of the payment of the money to the City and the plaintiff's claim was barred by the statutes of limitation.

Many other cases support our contention but we shall only refer to some of the better reasoned and leading cases:

> Rosedale v. Towner County, 56 N. Dak. 41, 216 N. W. 212;
>
> City of Centerville v. Turner County, 23 S. Dak. 424; 122 N. W. 350; on rehearing, 126 N. W. 605;
>
> Strough v. Board of Supervisors, 119 N. Y. 212; 23 N. E. 552;
>
> Re Elm St. in New York, 239 N. Y. 220; 146 N. E. 342;
>
> City of Webster v. Day Co., 26 S. Dak. 50; 127 N. W. 624;

Sioux City & St. Paul Railway v. O'Brien County, 118 Iowa 582; 92 N. W. 857;

Jones v. School District, 26 Kan. 490;

Pac. Coal Co. v. Pierce Co., 133 Wash. 278; 233 Pac. 953;

Parsons v. City of Rochester, 43 Hun 258 (N. Y.);

3 Cooley on Taxation, 4th Ed. p. 2593, Sec. 1304; 61CJ1000.

Appellee's pleadings and the agreed statement of facts show conclusively that the appellee and her assignors paid the several sums of money to the County more than four years prior to the institution of this action, with the exception of part of the payments mentioned in the twenty-first cause of action. Therefore, appellees' causes of action were barred by all the statutes of limitation (sections 2059, 2060 and 2063) and the appellant's demurrers should have been sustained and judgment rendered in favor of appellant.

THE PAYMENT OF THE MONEY TO APPELLANT DID NOT CREATE A TRUST RELATIONSHIP.

It was urged in the Court below that the money which had been collected from appellee and her assignors was held in trust by the County, and therefore, the statutes of limitation did not run against appellee's causes of action.

A trust relationship was not created when the money was paid to the County. The County demanded, received and retained it under a claim of right, and appellee and her assignors paid the money to the County under protest and disputed the County's right to collect it. When the money was paid to the County Treasurer it became his duty, under the law, to immediately apportion the money to the various County funds set up by law, and the Board of Supervisors. Sections 775 and 864, Revised Code of Arizona, 1928, which reads as follows:

> "775. *Expense fund; annual budget; duties of treasurer.* The board shall create a fund known as the expense fund, and shall order, whenever necessary, the transfer of sufficient money into said fund from the general fund of such county to pay the expenses of maintaining the government of such county until additional revenues may be collected to defray such expenses. * * * The county treasurer shall make such transfer when ordered by such board, and pay from such expense fund orders drawn thereon by the board for the maintenance of the county government, such orders to be drawn and signed as county warrants. * * *
>
> 864. *Duties.* The county treasurer shall: 1. Receive all money of the county, and all other money directed by law to be paid to him, safely keep, apply and pay the same and render account thereof as required by law; 2. keep an account of the receipt and expenditure of such money in

> books provided for that purpose; in which must be entered the amount, the time when, from whom, and on what account the money was received by him; the amount, time, when, to whom, and on what account disbursements were made by him; 3. keep his books so that the amount received and paid out on account of separate funds or specific appropriations are exhibited in separate and distinct accounts, and the whole receipts and expenditures shown in one general or cash account; and, 5. disburse the county money only on county warrants, issued by the board of supervisors, signed by the chairman and clerk of such board, or as provided by law."

and it was the duty of the county board to expend the money, to the credit of the various county funds to discharge county obligations.

The Court will presume that the treasurer and board performed their duties as required by law. When the county officers performed these duties, their actions amounted to an open assertion of a right to the money, adverse to the appellee's claim thereto, and if a trust relationship ever existed, the County's action in asserting ownership to the funds adversely to appellee's right, and handling them as its own was a repudiation of the trust, if any, and started the statutes of limitation to running.

In Rosedale School District vs. Towner County, supra, a contention was made that when money was received by a County for taxes illegally levied, assess-

ed and collected, a trust relationship was created between the county and the taxpayer, and that limitation did not run against an action to recover the money. But the court did not sustain the contention and said:

> "The next question for consideration is whether the transaction is one to which the staute is applicable. We think it is. Trusts are classified by the laws of this state as either voluntary or involuntary.
>
> "It will be noted that the county treasurer was and is the tax collector for both the school district and the county. It was his duty to collect all taxes due from the taxpayers of the county and to distribute the moneys received from the various taxpayers, respectively, to the state, county, and the subordinate political subdivisions of the county. On the first day of each month of each year he was required to make a full settlement with the county auditor and to distribute and credit to the proper funds all moneys which he had collected since the last settlement. It is presumed that this duty was regularly performed. There is no contention in this action that the county treasurer or the defendant county acted fraudulently or collusively or that the county received the money as the result of any fraud or collusion."

And then the Court used this language:

> "At the time of each settlement (that is, on the 1st day of each month), the county treasurer, in

distributing such funds, credited to the county (i.e., placed into the treasury of the county), all moneys collected for penalty and interest upon taxes of the plaintiff school district. The defendant county received the money as its money and not as money to be kept for the plaintiff. All of this was done openly and publicly. There was no fraudulent concealment. The county having received moneys belonging to the plaintiff school district, in these circumstances, the law implied an obligation or promise on the part of the county to repay it. This obligation arose when the county treasurer credited the moneys to the county.

"While there arose, by operation of law, an obligation on the part of the county to pay over to the school district the money belonging to the school district, and which the county treasurer through mistake had paid to the county, no such trust relation was created as prevents the operation of the statute of limitations. The equitable rule that the statute of limitations does not run in favor of the trustee against the cestui que trust applies only to express or voluntary trust and does not apply to implied or involuntary trusts."

See also School Directors vs. School Directors, 105 Ill. p. 653.

Strough vs. Board of Supervisors, supra, was an action to recover from the County money collected as

taxes for a certain purpose, but diverted by the County to another purpose. In that case, the County defended upon the ground that the plaintiff's cause of action was barred by the statutes of limitation. The plaintiff contended there was a trust relationship existing between the plaintiff and the County and that limitation did not run against the plaintiff's claim. In this case the Court said:

> "The duty imposed upon the treasurer was in a general sense a trust duty. This is true of every duty imposed upon a public officer, but persons injured by a violation of the duty for which they may maintain an action at law must pursue their remedy within the period of limitation of legal actions."

In Sioux City & St. Paul Railway vs. O'Brien County, supra, the Court held that even though a suit to recover taxes illegally collected is of an equitable nature, that the statutes of limitation are applicable as a defense to such an action.

See also Beaubien vs. Beaubien, 23 How 190; 16 L Ed. 484.

In City of Centerville vs. Turner County, supra, the Court said:

> "It is contended on the part of plaintiff that inasmuch as the trial court found that the defendant is made by law the agent of the plaintiff to collect the said taxes, and that the relation-

ship between plaintiff and defendant was a fiduciary one, and that said taxes when collected, were a trust fund in the hands of the defendant, in the execution of an express trust, the statute of limitations will not run. This seems to be the general rule in some jurisdictions where there has been a misappropriation of trust funds; but, even in those jurisdictions, it seems to be held that, where the public officer or municipality retains the money under claim or color of right, as in the case at bar, then the statute of limitations applies, and that the claim will be barred after the statutory limit has expired. 25 Cyc. 1164; Newsom v. Bartholomew, 103 Ind. 526, 3 N. E. 163; Churchman v. Indianapolis, 110 Ind. 259, 11 N. E. 301; Jasper Twp. v. Wheatland Twp., 62 Iowa, 62, 17 N. W. 205."

In the case of Centerville vs. Turner County, supra, a rehearing was granted and another opinion was written, 126 N. W. 605, wherein the Court adhered to and more fully discussed the rule announced in the original opinion.

FUNDS IN APPELLANT'S HANDS WERE NOT IMPRESSED WITH A TRUST BECAUSE APPELLEE DID NOT DESIGNATE OR TRACE ANY FUND UPON WHICH A TRUST OPERATED.

The pleadings and the agreed statement of facts do not point out or trace any particular fund or money upon which a trust was impressed. The money which appellee and her assignors paid to appellant was received and commingled with all the other funds

of appellant. It is elementary that to impress a trust upon a fund, the cestui que trust must point out or trace the particular money or funds impressed with the trust. Merely showing that the money was paid into a general fund does not establish a trust. In Korrick v. Robinson, 20 Ariz. 323, 180 Pac. 446, the court held:

> "The great weight of authority holds that it is not sufficient for a cestui que trust to prove that his money originally passed into the hands of an insolvent, and was used by him in his business. In following a trust fund, a court of equity will, as far as possible, aid the cestui que trust, by indulging every reasonable presumption in his favor, but with all of this advantage the cestui que trust must, in the end, locate the trust fund in the specific property he seeks to take out of the general assets of the insolvent trustee."

McComas v. Long, 85 Ind. 549, Thompson's Appeals, 22 Pa. St. 16.

IF ANY TRUST WAS CREATED IT WAS AN IMPLIED OR CONSTRUCTIVE TRUST AND LIMITATION BEGAN TO RUN AGAINST IT ON THE DATE OF ITS CREATION.

If the Court concludes that a trust was created by the transactions set up in this record, then it was not such a trust as would prevent the running of the statutes of limitation. The transaction does not show the existence of an express trust; an express

trust is only created by the direct and positive acts of the parties by some writing or deed or by words, either expressly or impliedly, evincing an intention to create a trust. 65 C. J. p. 220. Neither did the acts of the parties create a resulting trust. A resulting trust is one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction but not expressed in the deed or instrument. 65 C. J. 222. The record fails to show any action of the parties from which it could be inferred or implied that they contemplated creating a resulting trust. The record shows affirmatively that the parties did not contemplate that a trust relationship should be created. Appellant demanded and enforced the payment of the money and retained it as its own, and appellee and her assignors paid the money under protest, to keep appellant from selling their property. This disproves the existence of an express or a resulting trust.

If any trust was created it was a constructive or implied trust, as such trusts are defined by the Supreme Court of Arizona in the case of MacRae vs. MacRae, 37 Ariz. 307; 294 Pac. 280, as follows:

> "A constructive trust is one which does not arise by agreement or from the intention of the parties, but by operation of law, and fraud, actual or constructive, is an essential element thereto. Actual fraud is not always necessary, but such a trust will arise whenever the circumstances under which the property was acquired make it

> inequitable that it should be retained by the one who holds the legal title. These trusts are also known as trusts ex maleficio or trusts ex delicto."

The statutes of limitation begin to run against a constructive, implied or involuntary trust on the date of the creation of the trust, and if the facts pleaded and proved in this case did show that a constructive or implied trust was created, the same was created more than four years prior to the institution of the appellee's action and the plaintiff's causes of action were barred by the above quoted section of the statute. In Merrill vs. Montecello, 66 Fed. 165, affirmed 72 Fed. 462; 18 C. C. A. 636, the Court said:

> "In the case of an implied or constructive trust it is equally well settled unless there has been fraudulent concealment of the cause of action, lapse of time is as complete a bar in suits in equity as in actions at law, and the statutes of limitation begins to run when the cause of action has accrued."

In Cooper vs. Hill, 94 Fed. 582; 36 C. C. A. 402, the Court decided:

> "But lapse of time is a complete bar to a constructive or implied trust, both in equity and at law, unless there has been a fraudulent concealment of the cause of action, or other extraordinary circumstances which make the application of the doctrine of laches inequitable. Hayden v. Thompson, 36 U. S. App. 362, 377, 17 C. C. A. 592, 601, and 71 Fed. 60, 69."

In the case of Speidel vs. Henrici, 120 U. S. 377; 30 L. Ed. 718, it was decided:

> "In the case of implied or constructive trusts unless there has been fraudulent concealment of the cause of action, lapse of time is as complete a bar in equity as at law."

From Rosedale School District vs. Towner County, supra, we quote as follows:

> "The equitable rule that the statutes of limitation does not run in favor of the trustee against the cestui que trust applies only to express or voluntary trusts and does not apply to implied or involuntary trusts."

See also: Norton v. Bassett 154 Cal. 411; 97 Pac. 894; 129 Am. St. Rep. 162; Hayman v. Keally, 11 Fed. case No. 6265; 3 Cranch C. C. 325; 37 C. J. 909; 17 R. C. L. p. 711, sec. 66.

LIMITATION WAS A DEFENSE TO APPELLEE'S ACTION BECAUSE THIS WAS AN ACTION AT LAW TO COLLECT A DEBT AND NOT A SUIT IN EQUITY TO ESTABLISH OR ENFORCE A TRUST.

If a trust relationship existed between appellant and appellee the statutes of limitations are applicable for the reason that this is an action at law to recover a debt and is not an action in equity to establish or enforce a trust. The doctrine that a trust is exempt from the operation of the statutes of limitation ap-

plies only to trusts over which only a court of equity has jurisdiction, and does not apply where there is a concurrent legal remedy. Miles vs. Vivian, 79 Fed. 848 (C. C. A.); Hayward vs. Gunn, 82 Ill. 385; Wingate vs. Wingate, 11 Tex. 433. From Kennedy vs. Baker, 59 Tex. 150, we quote as follows:

> "But it does not follow that every kind of trust forms an exception to the operation of the statute of limitations; if so, half the business transactions of men would be removed from its influence. Their doctrine has been settled by a train of decisions in the case of Lackey v. Lackey, Prec. in Ch. 518, decided by Lord Macclesfield, down to the present time, that to remove a trust from the operation of the statute it must be such a trust, technically, as is created by the mutual confidence of the parties, such as equity alone can take cognizance of and afford redress. If it is a trust that common law courts could give relief, the statute will run although the party may have sought his relief in chancery."

CONCLUSION

As to the twenty-first cause of action, it is alleged that certain taxes were paid after the filing of the original and first amended complaint and about twelve or thirteen years after the Supreme Court of the United States held that such taxes could not be collected. They were paid voluntarily but apparently were paid in an effort to bolster up the causes of action set forth in the other twenty counts of the complaint. There is no justification for the payment of these taxes at such a late date and judgment should

have been in favor of the defendant on each cause of action.

We respectfully submit that the judgment of the lower Court should be reversed and the cause remanded with instructions to sustain appellant's demurrers, and enter judgment for the defendant, for all of which we respectfully pray.

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No. 7766

United States
Circuit Court of Appeals
For the Ninth Circuit

THE COUNTY OF MARICOPA, STATE OF ARIZONA,
Appellant.

vs.

OLIVIA ROSEVEARE,
Appellee.

APPELLANT'S SUPPLEMENTAL BRIEF

Upon Appeal from the United States District Court for the District of Arizona.

HARRY JOHNSON,
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FILED

DEC - 9 1935

PAUL P. O'BRIEN

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APPELLANT'S SUPPLEMENTAL BRIEF

Since filing appellant's brief in this case, the Supreme Court of Arizona has rendered its decision in the case of

Maricopa County vs. Hodgin
50 Pac. 2nd 15 (Advance Sheet of Nov. 22, 1935)

in which it is held that money received by the County Treasurer in payment of wrongfully levied taxes when paid under protest do not become trust funds in the hands of the Treasurer, and a judgment recovered by a taxpayer for such payments must be collected in the same manner as other claims. In this case the Court said:

"The trial court treated the taxes paid by Hodgin under protest as a trust fund and not as tax money belonging to the county or the taxing units for which it was collected. There is as much statutory authority to treat taxes paid without protest as trust funds as there is to so treat taxes paid under protest. A careful examination of our revenue laws fails to disclose any intention on the part of the Legislative to have the protested tax under Section 55, supra, treated or handled any different from taxes willingly paid. The receipt issued for the taxes is the same in both cases. After collection, they are kept by the same custodian, are apportioned and paid out, or disposed of without distinction.

"While the exemptions to persons falling within the classifications in section 2, article 9, of the Constitution and subdivision 4, § 3066, Revised Code of 1928, as we said in the Calhoun Case, supra, are absolute, the mode and manner of protecting and securing that right is left with the Legislature. Section 11, article 9, of the Constitution reads: 'The manner, method and mode of assessing, equalizing and levying taxes in the State of Arizona shall be such as may be prescribed by law.' The Legislature has prescribed when and how the exemption may be presented and proved. Chapter 91, Sess. Laws 1929. It had the right to do this. The Legislature also has the right to require one who has not pursued the method prescribed to pay his

> taxes before he may litigate the question of his right to the exemption. It could have provided, had it seen fit, that the taxes should be held intact and disposed of in accordance with the result of the litigation, but it rather chose to treat the taxes as belonging to the county and the taxpayer as a judgment creditor, to be repaid as other judgment creditors."

This case, we believe, is conclusive on the question as to whether or not taxes paid under protest to a county treasurer in Arizona can be considered as trust funds under the well known rule of law that Federal courts will follow the decisions of the highest court of a state relating to constructions of its constitution and statutes.

Respectfully submitted,

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THE COUNTY OF MARICOPA,
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Appellant,

vs.

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Appellee.

APPELLEE'S BRIEF

APPELLEE'S STATEMENT OF THE CASE

This is an action at law to recover taxes illegally exacted from appellee and her assignors by appellant. The illegality of collection of such taxes was judicially determined by the Supreme Court of the United States. Irvin vs. Wright, 258 U. S. 219. Appellant admits it had no right to collect the taxes involved, and that their collection was illegal (P 3 Appellant's Brief), and that unless the "statutes of limitation are available as a defense to this action, appellee is entitled to recover the amounts sued for." (P 4 Appellant's Brief).

Appellee filed an original complaint. Appellant states it was filed in 1931 (P 1 Appellant's Brief), but the original complaint is not in the transcript of Record, nor does the date of its filing appear, hence when same was filed cannot be determined from the record.

Appellant's statement that "the complaint alleged that all the money for which a recovery was sought was paid to and received by the appellant more than six years prior to the filing of the action" (P 1 Appellant's Brief), is not borne out by the record. See appellee's second amended complaint (Tr 74).

November 19, 1931, appellee filed an Amended Complaint setting forth 21 causes of action (Tr 4-52).

November 27, 1931, appellant filed a Special Demurrer to Amended Complaint on the ground that limitations had run (Tr 53-4).

December 14, 1931, court ordered special demurrer to original complaint stricken because superseded by special demurrer to Amended Complaint, and took special demurrer to Amended Complaint under advisement (Tr 56-7).

January 28, 1932, court overruled special demurrer to Amended Complaint (Tr 57).

February 4, 1932, appellant filed answer to Amended Complaint pleading the two, three and

four year statutes of limitation, and by way of a separate defense, a general denial (Tr 58-60).

February 16, 1933, written waiver of trial by jury and consent to trial before Court, was filed (Tr 62).

February 20, 1933, an "Amended Agreed Statement of Facts" covering 21 claims for tax refunds was filed (Tr 63). There were numerous variances in the agreed facts and the causes of action set forth in the Amended Complaint, names of parties assigning claims in some instances being different; property upon which taxes were assessed, years of assessment, and dates of payment of taxes differed in many instances, as well as amounts paid. Compare Amended Agreed Statement of Facts (Tr 63) and Amended Complaint (Tr 4). These variances necessitated the filing of a Second Amended Complaint in order that the pleadings might conform to the proof.

September 17, 1934, stipulation was filed as follows:

> "That the Second Amended Complaint and the Agreed Statement of Facts, setting forth the claim of the plaintiff as the first cause of action and the assigned claims as subsequent causes of action, may be filed without a further order of the above entitled court;
>
> "That the assignments of the various assignors to Olivia Roseveare, the plaintiff, may

> be filed as evidence of the transfer of the various claims;
>
> "That upon the defendant's consent to the court's rendering judgment in favor of the plaintiff on her first cause of action and including all the other subsequent causes of action in the sum of $13,024.32, the plaintiff will waive and does waive all interest accruing on the said sum and sums of money paid by the plaintiff and her assignors as taxes back of the years 1931 or otherwise three years interest." (Tr 72-73).

September 18, 1934, pursuant to said stipulation the Court ordered that Plaintiff be permitted to file Second Amended Complaint in accordance with said stipulation. (Tr 73-74). This stipulation and order should be kept in mind in considering appellant's four assignments of error, and the statement in appellant's brief that "On September 18, 1934, appellee filed a second amended complaint upon which the case was tried" (P 3 of Appellant's Brief).

THE APPELLANT DID NOT DEMUR SPECIALLY OR AT ALL TO THE SECOND AMENDED COMPLAINT SO FILED, AND NEVER FILED AN ANSWER THERETO.

Appellant's statement that "The appellant's demurrers were urged against the second amended complaint and were overruled and an exception taken to the Court's ruling (Tr 123)", page 3 of appellant's brief, is not borne out by the record.

October 16, 1934, the cause went to trial before the Court without a jury. Appellee was sworn and examined in her own behalf, and Appellee's Exhibit Number one, 21 assignments of Tax Claims was admitted in evidence, whereupon appellee rested, and the following minute entry appears:

> "Whereupon, defendant renews Special Demurrers to Plaintiff's *Amended* Complaint, and excepts to the Order of the Court HERETOFORE entered herein, overruling said demurrers." (Tr 122-123).

Thereupon appellant rested. Appellant did not request a ruling as above indicated, and the court did not rule thereon, obviously because the amended complaint, having been superseded by the Second Amended Complaint, was *functus officio.*

The Court thereupon ordered judgment for the appellee (Tr 123-124), and judgment was entered in favor of appellee as per stipulation (Tr 72-73) for the principal sum of $13,024.32, together with the sum of $2944.38 interest, $27.30 costs, and the total sum of $15,996.00 to bear interest at the rate of 6 per cent per annum from October 16, 1934, until paid (Tr 124-5).

Appellant made no motion for judgment, nor any motion requiring the court to make a declaration of a principle of law as to the Second Amended Complaint or the Amended Agreed Statement of Facts and the evidence, and took no exception to

the judgment of the court, nor does the Transcript of Record contain a bill of exceptions.

POINT ONE

THE QUESTION OF LIMITATIONS IS NOT PRESENTED BY THE RECORD IN SUCH A MANNER THAT APPELLANT'S ASSIGNMENTS OF ERROR CAN BE CONSIDERED BY THE COURT.

ARGUMENT

(a) Upon the filing of the second amended complaint the first amended complaint became *functus officio* from the date of such filing, and neither a special demurrer nor an answer setting up the plea of limitations, was filed thereto, hence not being raised either by demurrer or plea, limitations were and are not available to appellant in this action.

> Sec. 2069 R. C. '28 of Arizona: "The laws of Limitation are not available to any person in an action unless specially set forth as a defense."

That the cause of action is barred by limitations is a ground of demurrer. Sec. 3776 R. C. '28.

If such objection is not taken either by demurrer or answer the defendant waives same. Sec. 3777 R. C. '28.

This waiver has been applied in action where County was defendant:

> Santa Cruz County, State of Arizona, v. Earhart, 20 Ariz. 141, 177 Pac. 270.

The Supreme Court of Arizona has been quick to enforce a waiver, even where limitations were properly pleaded:

> Ainsworth v. Lipsohn, 22 Ariz. 291-7, 196 Pac. 1028-30 Connor Livestock Co. v. Fisher, 32 Ariz. 80-6, 255 Pac. 996-8.

> "Among other contentions made is that the *statute of limitations is a bar to the action. It is perhaps a sufficient answer to this to say that the statute was not pleaded as a defense to the cause of action set forth in the amended petition.* The original petition was filed December 19, 1922. This was general in terms and made no reference to any written contracts. January 16, 1923, a demurrer to the petition was interposed on the ground that the action was not commenced within the time required by regulation 83 for the United States Consular Courts in China. April 10, 1923, an amended petition was filed, based on the written contracts, and copies of those contracts were attached as exhibits. April 21, 1923, the court filed an opinion overruling the demurrer to the petition. It would appear that the record is somewhat inconsistent on its face.
>
> "*The amended petition*, complete in itself,

superseded the original petition for all purposes, and no ruling of the court on the original petition, whether made before or after the amendment can be assigned as error. 'An amended complaint, which is complete in itself, and which does not refer to or adopt the original complaint as a part of it, entirely supersedes its predecessor, and becomes the sole statement of the cause of action. *The original complaint becomes functus officio from the date of the filing of its successors.*' United States v. Gentry, 119 F. 70, 75, 55 C. C. A. 658, 663."

Wulfsohn v. Russo-Asiatic Bank, 11 F. (2d) 715 (9th C. C. A.).

See also Eisenbeiss v. Payne. 25 P. (2d) 162-4). (Ariz.).

Appellant's first three assignments of error are that the Court erred in overruling the special demurrer to the Complaint and Amended Complaint (P. 4, 5, 6, Appellant's brief). The original complaint is not contained in the Transcript of Record, nor is the original demurrer. The amended complaint and the original complaint became *functus officio* upon the filing of the second amended complaint, to which no demurrer or answer was ever filed. Furthermore, the demurrer and answer filed as against the amended complaint were not urged as against the second amended complaint, and no ruling insofar as the second amended complaint was concerned was ever obtained relative to same being barred by limitations, appellant, at the close

of appellee's case, contenting itself with the following statement: "Whereupon, defendant renews Special Demurrers to Plaintiff's Amended Complaint, and excepts to the Order of the Court HERETOFORE entered herein, overruling said demurrers." (Tr 122-123). Even this statement was not made until after trial. By proceeding to trial without obtaining a ruling, the demurrer was in any event waived. Dessart v. Bonynge, 10 Ariz. 37, 85 Pac. 723; Reid v. Van Winkle, 31 Ariz. 267-9, 252 Pac. 189-90.

This leaves for consideration, only the fourth assignment of error, page 6 appellant's brief, as follows:

> "The Court erred in rendering the judgment herein for the reason that the same appears to have been based upon an agreed statement of facts, and it appears in said agreed statement of facts that each of the causes of action set forth in the COMPLAINT AND AMENDED COMPLAINT is barred by the Statute of limitations, and particularly by the provisions of said Sections 2059, 2060 and 2063, Revised Code of Arizona, 1928; in that it appears in said agreed statement of facts that each of said causes of action sued on herein accrued more than four years prior to commencement of this action."

(b) Appellant failed to move for judgment in its favor when appellee rested; failed to ask for a declaration of law that it was entitled to

judgment upon the evidence, including the Amended Agreed Statements of Facts, stipulation of counsel, and the other evidence introduced in the trial court and failed to invoke the Court's ruling thereon; failed to except to the judgment as rendered in favor of appellee; failed to present a bill of exceptions to this Court.

The Court will again note the statement on page 3 of Appellant's brief that "On September 18, 1934, appellee filed a second amended complaint upon which complaint the case was tried." The Court will also observe the further statement in the same paragraph that "The appellant's demurrers were urged against the second amended complaint and were overruled and an exception taken to the Court's ruling (Tr 123)." This latter statement is not borne out by the record (Tr 123), and is incorrect, and the Court will observe that each assignment of error is based not in any respect on the Second Amended Complaint, but solely upon the original complaint and first amended complaint. The second amended complaint was filed pursuant to stipulation (Tr 72-73), and permitted and ordered to be filed by the Court (Tr 73-74), and was never withdrawn. Counsel, in their brief, would like to circumvent the fact that no demurrer or answer was filed or urged as against the second amended complaint, and no ruling by the Court obtained thereon, but we do not think that is possible. The defense of limitations may be, and we believe has been, waived, as shown by the record.

It is the rule no doubt, that errors apparent upon the face of the record may be reviewed in the absence of a formal bill of exceptions, and where there is an agreed statement of facts the power of review in a law case tried before the court without a jury, is somewhat more ample than in the absence of an agreed statement of facts. Nevertheless, where there is an indication in the record that the appellant waived its right to assign error on a particular matter, a bill of exceptions is necessary; and where it appears that there was evidence introduced in addition to the agreed statement of facts, a bill of exceptions is also necessary to entitle appellant to review of the alleged error.

> "But no exception or bill of exceptions is necessary to open a question of law already apparent on the record and there is nothing in the record that INDICATES A WAIVER OF THE DEFENDANT'S RIGHTS."

> Denver v. Home Savings Bank, 236 U. S. 101-104.
>
> Wulfsohn v. Russo-Asiatic Bank, 11 F. (2d) 715-16 (9th C. C. A.).
>
> Lumbermen's Trust Co. v. Town of Ryegate, 61 F. (2d) 14-17.
>
> Kansas City Life Ins. Co. v. Shirk, 50 F. (2d) 1046 (10th C. C. A.).

> "If plaintiff desired to preserve his right to review, in the event of an adverse ruling in such final disposition, he should have moved for judgment in his favor or asked for a decla-

ration of law that he was entitled to judgment upon the evidence as a matter of law, and invoked the court's ruling thereon and brought such rulings here for review upon a proper bill of exceptions.

"The assignments of error . . . . . are leveled at the general finding of the court and for the reasons above stated present questions not open to review here."

McPherson v. Cement Gun Co., Inc., 59 F (2d) 889-890 (10th C. C. A.).

THERE IS AN INDICATION IN THE RECORD THAT APPELLANT WAIVED ITS RIGHTS, AND THE APPELLANT DID WAIVE ITS RIGHTS. It failed to demur or answer to the Second Amended Complaint. Also, the stipulation providing for waiver of three year's interest upon defendant's consent to the court's rendering judgment in favor of the plaintiff on her first cause of action and including all the other subsequent causes of action in the sum of $13,024.32 (Tr 72-73), and the fact that the judgment (Tr 124), approved as to form by counsel for appellant, and never excepted to, followed the provisions of said stipulation, indicate a waiver, and that the court took said stipulation into consideration in rendering its judgment.

For these reasons, notwithstanding the Amended Agreed Statement of Facts, a bill of exceptions was necessary to entitle appellant to a review of any one or all of its four assignments of error, as

otherwise the exact basis for the court's ruling and judgment is not presented to this Court fairly.

The record further fails to show that appellant requested a declaration of law in its favor on the Amended Agreed Statement of Facts and/or the other evidence introduced (Tr 123) and said stipulation and the Second Amended Complaint. No motion for judgment on behalf of appellant was made, and no exception to an adverse ruling thereon taken. A bill of exceptions was necessary, under the record here presented.

Lumbermen's Trust Co. v. Town of Ryegate, 61 F. (2d) 715-16 (9th C. C. A.).

While the modern trend of authority is that the defense of limitations is no longer considered an unconscionable defense, it being a statute of repose, and to prevent fraud, yet the instant case does not fall within the logic of such reasoning, as it is conceded in Appellant's brief to be the fact that the taxes sought to be recovered were illegally collected, and the policy of the County of Maricopa heretofore has been with the exception of this present appeal, that upon a judicial determination that the land involved was tax exempt under the Irvin v. Wright case supra, the refund would be made, and no appeals from such cases were taken. The County is morally and legally obligated to refund these taxes, judicially determined by the Supreme Court of the United States to have been illegally exacted in violation of federal law.

POINT TWO

IN ANY EVENT THE TWENTY-FIRST CAUSE OF ACTION WAS NOT VULNERABLE TO DEMURRER IN THE FORM PLEAD ON THE GROUND OF LIMITATIONS AND APPELLEE WAS ENTITLED TO JUDGMENT ON HER SECOND AMENDED COMPLAINT AND THE AMENDED AGREED STATEMENT OF FACTS THEREON, AND NO REQUEST HAVING BEEN MADE BY APPELLANT FOR A SEPARATE RULING AS TO EACH CAUSE OF ACTION, AND NO EXCEPTION HAVING BEEN TAKEN TO THE GENERAL FORM OF THE COURT'S ORDER OVERRULING DEMURRER, NOR TO THE FORM OF JUDGMENT, AND COUNSEL FOR APPELLANT HAVING APPROVED THE FORM OF JUDGMENT, APPELLANT IS NOT NOW ENTITLED TO REVERSAL NOR TO COMPLAIN THEREOF.

ARGUMENT

> "We think the plaintiff's contention must prevail. It is elementary that, if any count in a declaration is good, a general demurrer to the whole declaration must be overruled, unless the court shall make the ruling speak the whole truth by sustaining in part and overruling in part."
>
> Burgess v. Mazetta Mfg. Co. 198 Fed. 855 (7th C. C. A.).
>
> "The rule is well settled that where a complaint contains several counts a general

demurrer thereto upon the ground that it fails to state facts sufficient to constitute a cause of action will be overruled if either one of the counts be sufficient. Maxwell on Code Pleading, 375. The proper procedure, where there are several counts is to demur to each one separately."

Palmer v. Breed, 5 Ariz. 18, 43 Pac. 219.

"The rule that a demurrer to a declaration, complaint or petition will be overruled where the pleading states facts sufficient to entitle plaintiff to any relief either legal or equitable, applies whether the matter alleged is sufficient to entitle plaintiff to a part only of the relief prayed for."

49 C. J. 429, Sec. 541.

It appears in the Amended Agreed Statement of Facts that taxes were assessed and collected for years 1916 to 1933 inclusive in the lump sum of $2833.63 and were paid under protest during the year for which they were assessed. (Tr 71 and 119). No attempt was made by appellant to have the specific amounts paid during each year, segregated, and hence it is impossible to determine what part, if any thereof, is barred, if appellant is entitled to assign error in this case thereon at all. Such segregation not having been made nor requested, the Second Amended Complaint was to that extent at least good as against demurrer, and the judgment rendered was good at least to that extent.

If the special demurrer filed against the first amended complaint may be considered as a separate demurrer to each cause of action (note its form, Tr 53-54, and its prayer, viz: "Wherefore, defendant prays that plaintiff's amended complaint be dismissed"), nevertheless the order of the court overruling same was general in form (Tr 57), and the judgment entered (Tr 124-5), was general in form with no attempt at segregation as to the specific causes of action. No request was made to the Court for a separate ruling as to each separate cause of action, and no objection was made to the general form of the order overruling the demurrer, nor to the general form of the judgment, nor was any exception taken as to the forms thereof. The order overruling the special demurrer was responsive to the prayer of the demurrer being the converse of the relief prayed for. In the absence of such a request, and exception to an adverse ruling thereon, the order overruling the demurrer to appellee's first Amended Complaint was proper, and the judgment, its form not having been objected to, and exceptions reserved to an adverse ruling thereon, and no request having been made for judgment segregating the specific causes of action, but, on the contrary, counsel for appellant having approved the judgment as to form (Tr 125), neither the order overruling the special demurrer to appellee's amended complaint, nor the judgment itself, are subject to reversal.

POINT THREE

LIMITATIONS HAVE NOT RUN AGAINST THE CAUSES OF ACTION ALLEGED IN THE SECOND AMENDED COMPLAINT.

ARGUMENT

(a) The transcript of record does not disclose when the action was commenced. The original complaint is not included in the transcript, nor its date of filing. It cannot be determined that limitations had run at the time the action was commenced. The presumption is in favor of the judgment of the lower court. The burden was upon appellant to present a record clearly showing error.

(b) By section 20 (second) of the Enabling Act, xl Revised Code of 1928, pursuant to which act Arizona was admitted to the Union, lands against which the taxes in question were assessed were forever exempted from taxation by the State of Arizona while same remained the property of the United States. A vested right to such exemption was created:

Irvin v. Wright, 258, U. S. 219, 66 L. Ed. 573, 42 S. C. 293.

United States v. Board of Com'rs of Comanche County, Okl. (DC) 6 F. Supp. 401.

and was recognized by Section 2, Article IX, of the Constitution of Arizona, providing that there shall be exempt from taxation all Federal . . . . property.

This right to exemption is absolute and self executing. The Supreme Court of Arizona, construing the same section and article of the State Constitution, held that a statute providing that unless a Soldier claimed his exemption between January and July of each year, he waived his rights thereto, was invalid in-so-far as it provided for a waiver.

> "The right of exemption is absolute, and no act of the legislature can take it from him. The provision for the exemption, under the conditions and circumstances prescribed, is mandatory in character and self-executing. His failure to make the proof before the assessor was not a waiver of the exemption, AND LEGISLATION ATTEMPTING TO MAKE IT A WAIVER IS INEFFECTIVE."
>
> Calhoun v. Flynn, 37 Ariz. 62-68, 289 Pac. 157-9.

The case supra, of course, involved a purely state right as distinguished from a Federal right. The Enabling Act is a contract between the Federal government and the State, and appellee's rights are preserved by that act, the United States Constitution and the State Constitution. To hold, where a political subdivision of the State has collected an illegal tax under such circumstances, that appellee's right to exemption from such tax may be limited by a general statute of limitations merely because she has paid the tax, the right being primarily Federal, is to permit to be done indirectly what cannot be done directly.

(c) In any event, the County having collected such tax, illegal by virtue of such Federal exemption, and the right to exemption being absolute and one that could not be taken away by any limiting legislation of the State requiring payment of tax under protest and suit to recover, it should be held that appellee's cause of action did not accrue until a judicial determination had been obtained that the specific land upon which the tax was paid, was tax exempt land. With the exception of this particular case, that procedure has heretofore been followed, by the county.

(d) The statute of limitations does not apply where the United States is a party:

United States v. Rickert, 188 U. S. 436, 23 S. Ct. 478, 47 L. Ed. 532.

United States v. Kagman, 118 U. S. 375, 6 S. Ct. 1109, 30 L. Ed. 228.

United States v. Nice, 241 U. S. 597, 36 S. Ct. 696, 60 L. Ed. 1192.

United States v. Board of Com'rs of Comanche County, Okl. (DC) 6 F. Supp. 401.

United States v. Minnesota, 270 U. S. 181, 46 S. Ct. 298, 70 L. Ed. 539.

The homesteaders became third party beneficiaries under the compact between the Federal and State Government (Enabling Act). The rights of the homesteader are measured by the rights of the Federal Government. The homsteaders are entitled to the immunities and privileges of the Government. The matter is one of public interest.

The Federal Government reserved to itself a dominating sovereignty in the affairs of the homesteader under its laws, rules, and regulations, including the right to administer its laws exclusively in matters pertaining thereto, precluding the States from interfering therewith or infringing thereupon. The homsteaders being the beneficiaries of the contract, the State may not, by a general statute of limitations which cannot be read into the contract, impair their rights. The appellant having violated a purely Federal right of appellee should not be permitted to avoid its illegal act by plea of limitations.

(e) Upon collection of the instant taxes, the County became a trustee for the benefit of the taxpayers. A trustee cannot invoke the statute of limitations until he renounces the trust and thereafter claims possession independent of the trust relationship, and communicates such repudiation to the beneficiary.

In the case of Ward v. Love County, 253 U. S. 17, 64 L. Ed. 751-9, the Supreme Court of the United States discussing the right of Indian allottees to recover taxes paid the county on exempt lands, said:

> "In legal contemplation it (the county) received the money for the use and benefit of the claimants, and should respond to them accordingly."

In the case of United States v. Board of Cm'rs of Comanche County, Okl. (D. C.) 6 F. Supp. 401, the court stated:

> "Where taxes are paid under protest the collecting authority can only hold them in trust."

If an illegal tax is collected and paid into a municipal treasury, it is held in trust for the persons paying same.

> Shoemaker v. Bd. Com. Grant Co. 36 Ind. 175,

> "As between the city and the school board, the city did not hold these collections in her own right. The possession of the one was the possession of the other; the possession of the city was precarious, and not *animo domini;* and being trustee she could not acquire the trust fund by lapse of time. There was no adverse possession in repudiation of the fiduciary relation."

> New Orleans v. Fisher, 180 U. S. 185, 45 L. Ed. 485.

> "Mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust; and time begins to run against a trust only from the time when it is openly disavowed by the trustee."

> Oliver v. Piatt, 3 How. 411, 11 L. Ed. 622.

> "Claim of owner of land to recover money which the United States held for him as trustee did not accrue until demand was made therefor."
>
> United States v. Cooper, 120 U. S. 126, 30L. Ed. 606.

The taxing authorities of the County honestly believing that they had a right to do so, and that they were legally bound to do so, collected the taxes. There was no fraud, misrepresentation, concealment or use of influential or confidential relations involved, hence the trust is not a constructive trust, but a resulting trust. In Perry on Trusts, 7th Ed., section 166, it is said:

> "If a person obtains legal title to property by such arts or acts or circumstances of circumvention, imposition or fraud, or if he obtains it by virtue of confidential relation and influence under such circumstances that he ought not, according to the rules of equity and good conscience, as administered in chancery, to hold and enjoy the beneficial interest of the property, courts of equity, in order to administer complete justice between the parties, will raise a trust by a construction out of such circumstances and relation;"
>
> "Generally speaking, the constructive trusts described in this chapter are not trust at all in the strict and proper signification of the word 'trustee'; but as courts are agreed

in administering the same remedy in a certain class of frauds as are administered in fraudulent breaches of trusts, and as courts and the profession have concurred in calling such frauds constructive trusts, there can be no misapprehension in continuing the same phraseology while a change might lead to confusion and misunderstanding."

Nevertheless, there was some question to the matter, and the taxing officials knew that in the event the taxes were declared illegal, as was done in the case of Irvin v. Wright, supra, it was their duty to refund such taxes. This duty is expressly recognized by Section 3136 R. C. 1928. The presumption is that the County did intend to refund the taxes and to perform its duty in the event the taxes were determined to be illegally collected. Under these circumstances, the trust is in the nature of a resulting trust rather than a constructive trust. The rule is stated in Vol. 65 Corpus Juris, page 223-5, as follows:

"Resulting Trust distinguished. Resulting and constructive trusts, while frequently confused, are clearly distinguishable. In the case of a resulting trust there is always the element, although it is an implied one, of an intention to create a trust, by reason of which, although it is by no means an express trust, it approaches more nearly thereto. Constructive trusts on the other hand have none of the elements of an express trust, but arise entirely by operation of law without reference to any

actual or supposed intention of creating a trust, and often directly contrary to such intention, for the purpose of working out right and justice or frustrating fraud. Constructive trusts embrace a much larger class of cases than resulting trusts, their forms and varieties being said to be practically without limit."

At page 366 of 65 C. J., appears the following:

> "The doctrine of resulting trusts is founded upon the presumed intention of the parties; and, as a general rule, it arises where, and only where, such may be reasonably presumed to be the intention of the parties, as determined from the facts and circumstances existing at the time of the transaction out of which it is sought to be established. In a resulting trust there is always the element of an intention to create a trust, which is not expressed, but is implied, or presumed by law from the attendant circumstances and without regard to the particular intentions of the parties, so, in a proper case, the trust may exist notwithstanding the party, to be charged as trustee may never have agreed to the trust and may have really intended to resist it."

Resulting trusts are in the same class as express trusts insofar as limitations are concerned, and the statute does not begin to run until there is some repudiation thereof brought to the knowledge of the beneficiary.

> "Resulting Trusts. So far as concerns the statute of limitations it is not material whether a suit is brought to enforce an express or a resulting trust, if it is a trust not cognizable by the courts of common law; and the statute of limitations does not run in favor of the trustee of a resulting trust, which most frequently arises where one person pays the consideration for a purchase and title is taken in the name of another, until the trustee disavows the trusts or asserts some right to the property inconsistent with, it and the *cestui que* trust has knowledge of such disavowal or assertion, or, from the circumstances, ought to have learned of it." 37 C. J. 908.

This rule has been followed by the Supreme Court of Arizona in the case of Navajo-Apache Bank etc. Co. v. Deamont, 19 Ariz. 335, 170 Pac. 798, where the court said:

> "The mortgagee, after paying the mortgage debt and the reasonable charges and expenses contemplated by the mortgage, held the overplus as the trustee for the appellant. This possession of such overplus was the possession of the beneficiaries thereof; hence the appeal of the statute of limitations under the facts and circumstances of this case, was of no avail."

A case that appears to be directly in point and supporting appellee's theory, decided by the Supreme Court of Arizona, is: Hammons v.

National Surety Co., 36 Ariz. 459-69, 287 P. 292-5.

See also Walrath v. Roberts, 12 F. (2d) 443.

(f) Section 3136 R. C. of 1928, gives the State's consent that the County be sued:

> " . . . . . After payment an action may be maintained to recover any tax illegally collected . . . . "

The statute contains no limitation as to time.

No limitation being prescribed therein, the general statutes of limitation are not applicable. The consent is granted in unlimited terms.

> Louisville Male High School v. Auditor, 80 Ky. 336, 342.

In other instances where suit against counties is authorized, limitations are specifically stated See Sec. 786 R. C. 1928. The same is true in statute authorizing suit direct against the State. See Sec. 30 R. C. 1928.

The legislature has modified the common law rule of limitations (See 1928 Revised Code of Arizona, Sections 786, 1566 and 1572), and if no limitation is set out by the Code, none is intended.

In conclusion, no attempt has been made to discuss the question whether the two, three or four year statutes of limitation (Sections 2059, 2060, 2063 supra), would be the applicable statute in the event any of such statutes were held to apply, as in Appellant's brief, page 4, it is con-

ceded that if any applies, it is the four year statute.

Neither have we attempted to distinguish the authorities cited in Appellant's brief, as to do so would unduly prolong this brief. Suffice to say, that none of the cases cited were based upon the points raised in this brief.

We respectfully submit that the judgment of the lower Court should be affirmed.

D. P. SKOUSEN,
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Attorneys for Appellee.

No. 7769

/0

United States
Circuit Court of Appeals
For the Ninth Circuit.

NEW MISSION MARKET, a Corporation,
Appellant.

vs.

UNITED DRUG COMPANY, a Delaware Corporation,
Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

FILED

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PAUL P. O'BRIEN,
CLERK

FEDERAL PRINTING AND COMPOSITION COMPANY, SAN FRANCISCO, CALIFORNIA

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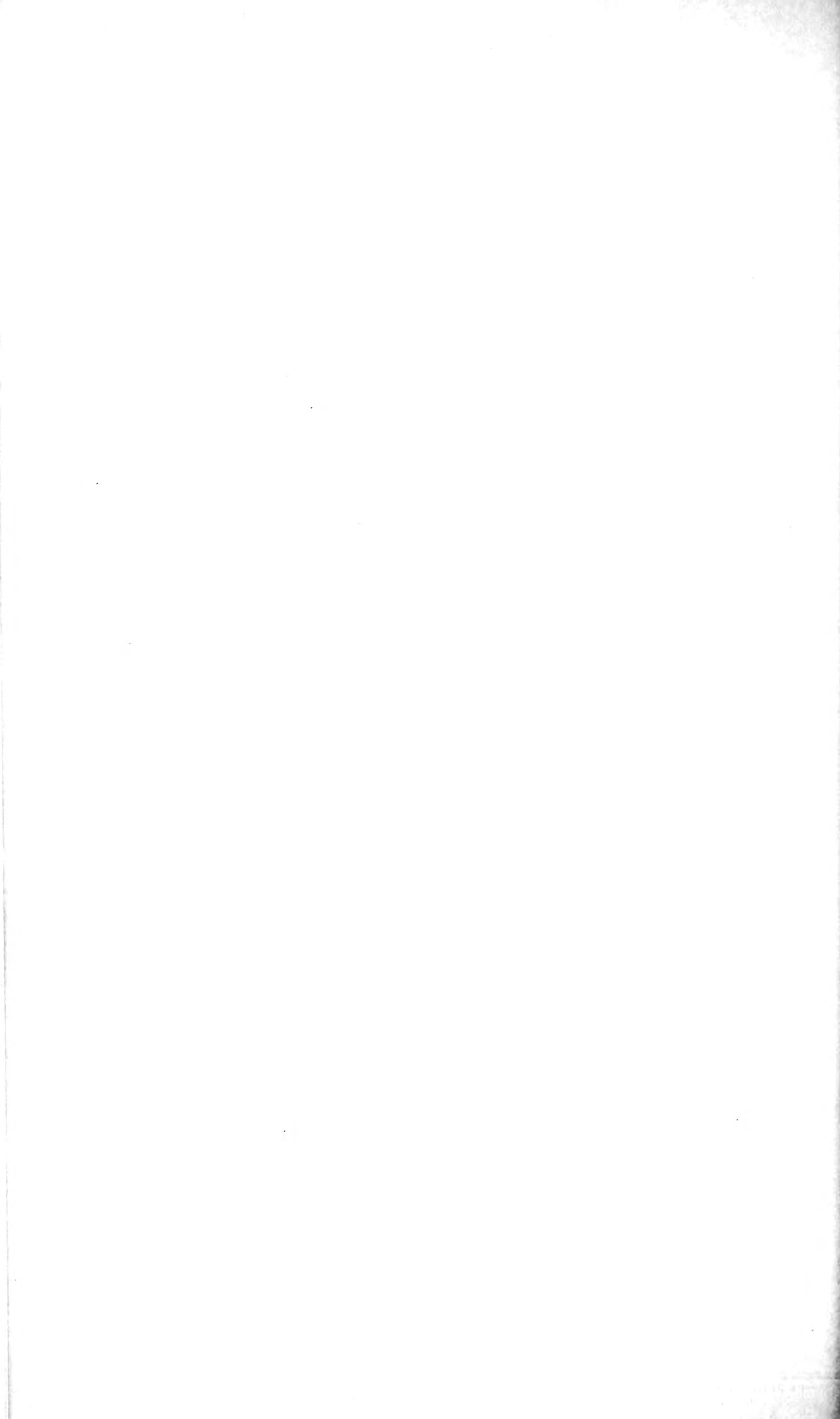

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the 'original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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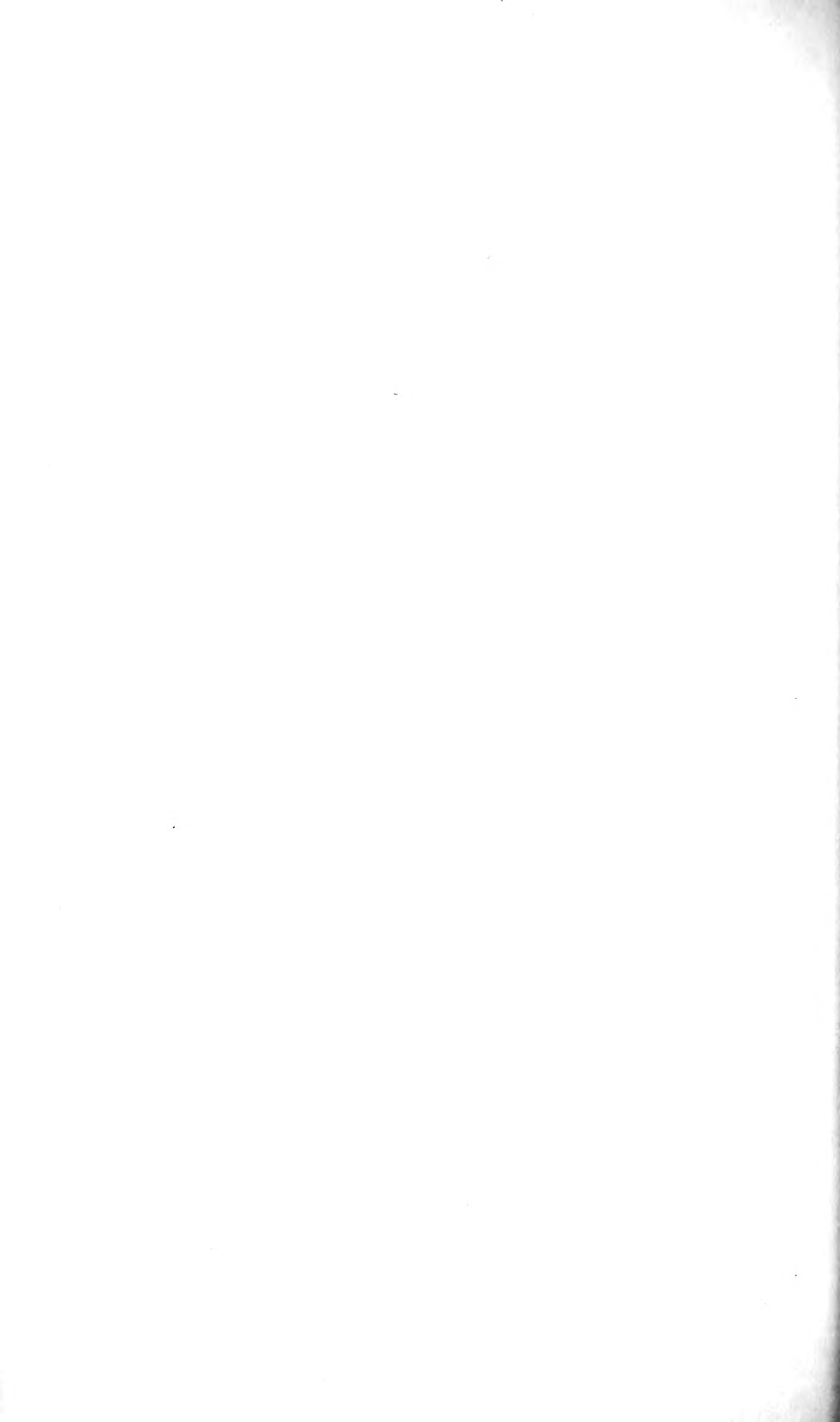

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In the Southern Division of the District Court of the United States for the Northern District of California.

No. 19,632-L

NEW MISSION MARKET, a corporation,

Plaintiff,

vs.

UNITED DRUG COMPANY, a Massachusetts corporation, and UNITED DRUG COMPANY, a Delaware corporation,

Defendants.

COMPLAINT UPON GUARANTY AND ASSUMPTION OF LIABILITY THEREUNDER

Comes now the plaintiff above named and complains of the defendants and for cause of action alleges:

I.

The ground upon which the jurisdiction of this Court depends is diversity of citizenship between the parties hereto.

II.

The plaintiff NEW MISSION MARKET now is and was at all times herein mentioned a corporation organized and existing under amd by virtue of the laws of the State of California, with its principal place of business located in the City and County of San Francisco, in said State, and is a citizen of the State of California and a resident of the City and

County of San Francisco, in the Southern Division of the Northern District of California.

III.

The defendant first above named, UNITED DRUG COMPANY, now is and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal place of business located in Boston, in said Commonwealth, and is a citizen of said Commonwealth, [1]* which corporation will hereafter be designated "Massachusetts Corporation."

IV.

The defendant second above named, UNITED DRUG COMPANY, now is and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business located in Boston, in the Commonwealth of Massachusetts, and is a citizen of the State of Delaware, which corporation will hereafter be designated "Delaware Corporation."

V.

The matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

*** Page numbering appearing at the foot of page of original certified Transcript of Record.**

VI.

That O'BRIEN-KIERNAN INVESTMENT CO. now is and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of California.

VII.

That LOUIS K. LIGGETT COMPANY now is and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts.

VIII.

That on February 27, 1926, O'BRIEN-KIERNAN INVESTMENT CO., a corporation, WILLIAM H. WOODFIELD, JR., and SAMUEL WEINSTEIN, as lessors, and LOUIS K. LIGGETT COMPANY, as lessee, made, executed and delivered each to the other, a certain written indenture of lease of the premises situate in the City and County of San Francisco, State of California, described as follows:

> The corner store and basement premises in that certain building, situate on the northwest corner of Mission and 22nd Streets, which corner store and basement have a frontage on Mission Street of 41 feet and a frontage on 22nd Street of 100 feet measured from the point of intersection of the westerly line of Mission Street with the northerly line of 22nd Street, said store being of uniform depth and width. [2]

a copy of which lease is attached hereto, marked Exhibit "A" and made a part hereof as if herein at length fully set forth, for the term of 20 years commencing June 5, 1927, or any date prior thereto upon which said lessors should tender possession of the premises to the lessee by written notice 60 days prior thereto, upon a minimum fixed rental which said lessee agreed to pay said lessors, in advance, on the first day of each month, as follows, to wit: $2,750.00 for each month for the first 5 years of said lease term; $3,000.00 for each month for the second five years of said lease term; $3,250.00 for each month for the third 5 years of said lease term; and $3,500.00 for each month for the fourth 5 years of said lease term; that in addition to the payment of the foregoing minimum rentals, said lease provided for the payment by said lessee to said lessors of an amount calculated upon a percentage of the gross receipts resulting from the operation of lessee's business in a portion of said premises; that plaintiff is informed and believes and therefore alleges on information and belief that the receipts of said business so operated by said lessee at no time reached an amount sufficient to require a payment in addition to said minimum rentals and plaintiff is therefore not seeking any recovery based upon such percentage of gross receipts in this action; that on the 5th day of June, 1927, said lessee entered into possession of said premises under said lease and said last-mentioned date was recognized and agreed to by said lessors and said lessee as and was the date of commencement of the term of said lease.

IX.

That concurrently with the execution of said lease and as part of the same transaction and in consideration thereof, Massachusetts Corporation made, executed and delivered to said lessors in writing its guaranty of the payment of the rental and performance of the terms, covenants and conditions of said lease by said lessee, in the words and figures as follows, to wit: [3]

> In consideration of the foregoing lease and One ($1.00) Dollar to the undersigned in hand paid by the lessors therein named, receipt of which is hereby acknowledged, United Drug Co., a corporation, does hereby covenant, promise and agree to and with said O'Brien-Kiernan Investment Company, William H. Woodfield, Jr. and Samuel Weinstein that the said Louis K. Liggett Company, lessee, shall well and truly pay all rents and perform and execute all the covenants and agreements therein contained on its part, and on its failure to do so in any particular the undersigned will forthwith pay unto said lessors, without any previous demand, all rents accrued and all damages incurred by reason of said failure, including reasonable attorney's fees.
>
> IN WITNESS WHEREOF, the undersigned corporation has caused its corporate name and seal to be hereunto affixed this 27th day of

February, 1926 by its officers thereunto duly authorized.

United Drug Co.

By Charles McCallum,
Vice-President

By..

X.

That on or about the first day of February, 1928, the Delaware Corporation, for valuable consideration, assumed and expressly agreed to perform all the obligations of the Massachusetts Corporation, including the obligations provided for in said guaranty.

XI.

That on or about the 31st day of March, 1933, LOUIS K. LIGGETT COMPANY filed its voluntary petition in bankruptcy in the United States District Court for the Southern District of New York, and on the 31st day of March, 1933, was duly adjudicated a bankrupt, and on the 15th day of April, 1933, Chandler Hovey, Roy A. Heymann and Thomas H. McInnerney were duly appointed Trustees in Bankruptcy of said LOUIS K. LIGGETT COMPANY, directly thereafter qualified as such, and ever since have been and now are the duly qualified and acting Trustees of the estate of said bankrupt.

XII.

That thereafter and on or about the first day of October, 1933, the plaintiff, by mesne assignments,

succeeded to the interest [4] and estate of the lessors in said lease and became entitled to all rentals called for thereby, both accrued and unpaid and to accrue, and to all benefits and privileges conferred by, arising out of and incident to said interest and estate inuring to the lessors therein, including said guaranty, and became entitled to the moneys, benefits and privileges due and to become due under said guaranty. That ever since said last-mentioned date the plaintiff has been and now is the owner of and the successor in interest to said interest and estate of said lessors and likewise has been and now is the successor in interest to the obligees named in said guaranty. That on or about the 5th day of October, 1933, written notice of the aforesaid succession of this plaintiff to the interest of said lessors in said lease and of its succession to the interests of the obligees in guaranty was given by the plaintiff to the lessee in said lease, to the Trustees in Bankruptcy of said lessee, and to each of the defendants herein.

XIII.

That pursuant to the terms of said lease there became due and payable, as rental for the premises demised thereby, the sum of $3,000.00 per month on the first day of each and every month commencing with March, 1933, and to and including October, 1933, or the total sum of $24,000.00. That on or about the 26th day of January, 1934, plaintiff served upon the lessee in the aforementioned lease at No. 41 East 42nd Street, New York, which is the place designated

in said lease for the service of such notice, upon the Trustees in Bankruptcy of said lessee, and upon the defendants herein, a notice in writing of the default in the payment of the rental reserved in said lease and of the fact that the plaintiff herein intended to rely upon said default as the basis for an action to be filed against defendants herein. That more than 15 days have elapsed since the service of said notice, and the lessee in the aforementioned lease, the Trustees in Bankruptcy of said lessee, and the [5] defendants herein, and each of them, have refused and failed to pay the sum of $24,000.00, or any part thereof, and that said sum of $24,000.00 is wholly unpaid.

XIV.

That a reasonable attorneys' fee for the institution and prosecution of this action is the sum of $5,000.00.

WHEREFORE, plaintiff prays judgment against said defendants, and each of said defendants, in the sum of $24,000.00, with interest thereon, for the sum of $5,000.00 attorneys' fees, for costs of suit herein incurred, and for such other and further relief as may be meet and proper in the premises.

YOUNG, HUDSON & RABINOWITZ
OSCAR SAMUELS

Attorneys for Plaintiff, 605 Market Street, San Francisco, California. [6]

State of California,
City and County of San Francisco—ss.

WILLIAM H. WOODFIELD, JR., being first duly sworn, deposes and says:

That he is an officer, to wit, Secretary, of NEW MISSION MARKET, a corporation, the plaintiff named in the foregoing Complaint, and makes this verification for and on its behalf; that he has read said Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief; and that as to those matters he believes it to be true.

WILLIAM H. WOODFIELD, JR.

Subscribed and sworn to before me this 28th day of February, 1934.

[Seal] JENNIE DAGGETT

Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires Feb. 29, 1936 [7]

EXHIBIT "A"

THIS INDENTURE, made and entered into this 27th day February, 1926, by and between O'BRIEN-KIERNAN INVESTMENT CO., a corporation duly organized and existing under and by virtue of the laws of the State of California, and WILLIAM H. WOODFIELD, JR., and SAMUEL WEINSTEIN, hereinafter called the lessors, and LOUIS K. LIG-

GETT COMPANY, a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts, and authorized to do and doing business in the State of California under and by virtue of the laws of the State of California, hereinafter called the lessee,

Witnesseth:

That the lessors, in consideration of the rents, covenants and agreements hereinafter contained, to be paid, kept and performed by the lessee, and upon the condition that each and all of the said covenants and agreements shall be fully kept and performed by the lessee, does by these presents lease, demise and let unto the lessee, for the purpose of conducting herein any lawful business, those certain premises situated in the City and County of San Francisco, State of California, and more particularly described as follows, to-wit:

The corner store and basement premises in that certain building situate on the northwest corner of Mission and Twenty-second Streets, which said corner store and basement premises have a frontage on Mission Street of forty-one (41) feet by one hundred (100) feet on Twenty-second Street, measured from the point of intersection of the west line of Mission Street with the northerly line of Twenty-second Street and extending to the centers of the bounding partitions, and are of uniform width and depth throughout. [8]

TO HAVE AND TO HOLD the said premises,

with the appurtenances, unto the lessee, for the term of twenty (20) years, commencing on the fifth day of June, 1927, or any date prior thereto upon which the lessor shall tender possession to the lessee by giving to lessee written notice, at least, sixty (60) days prior thereto, at the following rental, payable in gold coin of the United States of the present standard of weight and fineness, as follows, to-wit: Twenty-seven Hundred Fifty ($2750.00) Dollars for each month of the first five (5) years of the lease term, Three Thousand ($3000.00) Dollars for each month of the second five (5) years of the lease term, Thirty-two Hundred Fifty ($3250.00) Dollars for each month of the third five (5) years of the lease term and Thirty-five Hundred ($3500.00) Dollars for each month of the fourth five (5) years of the lease term. The above rentals provided for are fixed minimum rentals payable monthly in advance on the first day of each and every calendar month of the lease term in the amounts specified. In addition the *lease* shall pay to the lessor within thirty days next succeeding the close of each calendar year of the lease term, and on account of the rental of the demised premises for the year immediately passed, a sum of money in like gold coin which shall be computed upon the basis of the volume of the business transacted by lessee in the portion of the demised premises used by it for its own business during the said last passed year as follows, to-wit: The lessee shall charge itself for the annual rent of that portion of the demised premises actually occupied by it in the transaction of its busi-

ness a sum that shall be the net difference between the sum of the annual minimum rental for that year as provided in this lease, plus its hereinafter designated pro rata of increase in taxes, and subtracted amount of its income (or rental value if vacant) during that calendar year from its subtenants in the portion [9] of the herein demised premises not actually occupied by itself. It being understood that lessee shall not at any time rent or lease any part of said demised premises not to be occupied by it at a rental less than the approximate prevailing rental at the time of such renting or leasing. This computation shall fix the amount of the charge the lessee shall make against itself and its business in the premises occupied by it for the purposes of the computations of this lease. In the event that any portion of the demised premises not occupied by the lessee is vacant during any time the rental of said portion shall be taken into consideration instead of the rent thereof for such time.

Whenever in any year eight (8) per cent of the gross volume of business transacted by lessee in that portion of the demised premises occupied by it for its own business shall exceed the yearly rent that it shall charge itself, as above provided, for that year for said premises, then the lessee shall pay to the lessor in addition to the minimum rent provided for that year a sum of money equal to the amount by which eight (8) per cent of its said gross volume of business in said premises during that year shall exceed the said rental charge against itself for rent of said premises.

The proportion of the taxes upon the whole property in which the demised premises are situated that shall be payable by lessee to lessor during any year of the lease term shall be determined as follows, to-wit: The taxes upon said whole property for the fiscal year 1925-26 shall be taken as the basis of computation and shall be subtracted from the taxes upon the same property for the particular fiscal year during which computation is being made; and the lessee shall pay to the lessor that proportionate part of the said subtracted difference which the rental value of the premises herein demised during the then last past calendar year bears to the [10] rental value of the whole building in which said premises are situated during said year. In determining such rental value no deduction shall be made because of vacancy in any part of said building. When any portion of said building is rented, the rental thereof shall be conclusively considered to be the "rental value" for the purposes of this calculation.

In the event that the lessor and lessee cannot agree between themselves upon the rental value for any one year, then, upon the demand of either, they shall submit the question of such rental value to two competent and disinterested appraisers, who shall be reputable men, who have been engaged in the real estate business in San Francisco for, at least, three years previous, one of whom shall be selected by the lessor and one by the lessee, and in case these two cannot agree, they shall select an umpire. The decision of any two of the three shall be final and con-

clusive. The appraisal shall be in writing, and a copy thereof shall be given to the lessor and the lessee, and the finding of rental value then shall be the basis of the computation upon which shall be apportioned the payment of taxes for that year as hereinafter provided. The lessor and the lessee shall bear the cost of said arbitration equally between them.

And the lessee does hereby hire and take of and from the lessor the said premises, for the said term and at the said rental, and does hereby covenant and agree with the lessor as follows;

1. That the lessee will pay the said rent reserved to the lessor at the office of the lessor, or at such other place or places as may be designated from time to time by the lessor, at the times and in the manner provided as aforesaid for the payment thereof, without deduction, default or delay, and that in the event of the failure of the lessee so to do, or in the event of a breach of any [11] of the other covenants herein contained on the part of the lessee to be kept and performed, it shall be lawful for the lessors to re-enter into and upon the said premises, and every part thereof, and to remove all persons and property therefrom, and to repossess and enjoy the said premises as in the first and former estate of the lessors, anything to the contrary herein contained notwithstanding.

Provided, however, anything to the contrary herein contained notwithstanding, the lessors agree that they will not begin action for the recovery of any rent, or any other moneys due hereunder, or any

action based upon the failure on the part of the lessee to perform any of the terms, covenants or conditions hereof, unless and until the lessor sends a letter by prepaid, registered mail to lessee's New York office at Number 41 East Forty-second Street or such other place that lessee may in writing designate expressly advising the lessee of any default upon which the lessor intends to rely for any contemplated action against lessee, and the lessee shall have fifteen (15) days after mailing of such letter within which to make good the default of which complaint has been made by the lessor; provided, however, interest at the rate of six per cent (6%) per annum shall be paid and added to any amount of rent so in default for the time that the payment of said rent has been delayed.

If the lessee shall be in default in the performance of any condition or covenant herein contained, and shall abandon or vacate said premises, besides other remedies or rights the lessors may have, it shall be optional with the lessor to re-let the said premises for such rent and upon such terms as the lessor may see fit it being understood that lessors shall not rent or lease any part of the demised premises at a rental less than the approximate prevailing rental at the time of such rental or leasing, and if a sufficient sum shall not be thus realized after paying the expenses of such reletting and collecting to satisfy the rent hereby reserved, the lessee agrees to [12] satisfy and pay any deficiency, and to pay the expenses of such reletting and collecting.

2. That the lessee at all times during the life of this lease shall itself or any such subsidiary or such associate of the lessee as hereinafter described engaged in the same line of general drug business as lessee shall occupy for the purpose of conducting its own mercantile business the store at the corner of the demised property and which store shall not at any time have less than twenty-five (25) feet frontage upon Mission Street and sixty (60) feet frontage on Twenty-second Street, measurements to be computed in the same manner as the dimensions of the herein demised premises. And the lessee will not use or permit to be used the said corner store premises, or any part thereof, for any purpose or purposes other than for the purpose of conducting therein its own retail mercantile business or that of any such subsidiary or such associate of the lessee as hereinafter described engaged in the same line of general drug business as lessee and no use shall be made of said demised premises, nor acts done, which will increase the existing rate of insurance upon the building in which the demised premises are situate, unless said lessee shall pay the lessor the amount of such increase in cost of such insurance, nor shall the lessee sell, or permit to be kept, used or sold, in or about the said premises, any article which may be prohibited by the standard form of fire insurance policies.

3. That the lessee will not commit, or suffer to be committed, any waste upon the said premises; that the lessee shall be privileged to make such

alterations or changes in the herein demised premises (not changing or affecting or modifying any structural part thereof) as shall be necessary to conduct its own business, or that of any such subsidiary or such associate of lessee as aforesaid, or the business of its subtenants, and that any additions to or alter- [13] ations of the said premises, except movable furniture and trade fixtures, shall become at once a part of the realty and belong to the lessor; that at the termination of the lease term, by expiration of time, or otherwise, the lessee shall surrender the property to the lessor in whatever condition the premises are at the expiration of the lease, and the lessee shall not be required, at the expiration of the lease, to replace the property in the condition it was at the time the lessee received possession.

4. The lessee may assign this lease as a whole to any subsidiary or associate of the lessee in the same line of general drug business as lessee and which subsidiary or associate shall acquire a substantial part of the assets of the lessee and all the drug stores operated, owned and/or controlled by lessee in San Francisco or San Francisco and elsewhere and whose gross annual business shall amount to at least Five Million ($5,000,000.00) Dollars per year; and lessee may sublet any part of the demised premises to any other person for any lawful business, provided that the corner portion, twenty-five (25) feet on Mission Street by eighty (80) feet on Twenty-second Street to be occupied by lessee for its own business shall not be underlet except to such associate

or subsidiary as aforesaid. The lessee shall at all times, even after any assignment, be and remain directly liable to pay the rent and other payments, and perform all the other covenants and conditions herein provided, it being understood that no assignment shall be made unless the assignee shall also assume full responsibility for the payment of the rent and other payments in this lease provided, and for the performance of all the covenants and conditions hereof. In the event, however, that the lessee shall be adjudicated a bankrupt, either by voluntary or involuntary proceedings, this lease shall immediately terminate, and said lessors shall have the right immediately to re-enter said premises, and in no event shall this lease be treated as an asset [14] of the lessee after adjudication of bankruptcy, and if the lessee shall become insolvent or fail in business, or if a receiver shall be appointed to take charge of the business of lessee, or receive the rents of the demised premises, or if assignment be made for the benefit of creditors, then this lease may be terminated at once at the option of the lessors expressed in writing, in which event the lessors shall have the right immediately to reenter the demised premises, and in no event shall this lease be treated as an asset of the lessee after the exercise of said option.

5. That the lessee will, at its sole cost and expense, keep and maintain the interior of the demised premises, including plumbing (exclusive of such plumbing as is not devoted exclusively to lessee's premises) and the store fronts, also any exterior

walls that may have been altered by lessee, also such portions of the sidewalks including sidewalk lights and sidewalk doors in front of said demised premises as are above any sub-sidewalk space in good order and repair and in tenantable condition, injury thereof or destruction thereof by fire or the act of God excepted, during the full term hereof. And the lessee hereby waives all right to make repairs at the expense of the lessors as provided in Section 1942 of the Civil Code of the State of California as to any of the parts of the demised premises hereinabove in this paragraph agreed to be kept and repaired by the lessee.

6. That the lessee will, at its sole cost and expense, comply with all of the requirements pertaining to the demised premises including the business to be carried on by the lessee in the said premises, of all Municipal, State and Federal authorities now in force, and will faithfully observe in the use of the premises all Municipal ordinances and State and Federal Statutes now in force or which may hereafter be in force, a failure so to do, and the commencement or pendency in any State or Federal court of any abatement proceedings affecting the use of the lessors, be deemed to be a breach of this lease. [15]

7. That the lessee will pay for all water, heat, light and power and other utility supplied to the said premises.

8. That the lessee, as a material part of the consideration to be rendered to the lessor under this

lease, will, and does hereby, assume all risk of damage to goods, wares and merchandise in and upon the said demised premises from every source, and for the injuries to persons in or about the said demised premises from any cause, except where such injuries or damage result from negligence or omissions of the lessors and that the lessee will hold the lessors exempt and harmless for or on account of any such damage or injury, including any such damage or injury upon any portion of the sidewalks abutting upon said demised premises and which the lessee is obliged to keep and maintain and also upon any portion of the sidewalks including sidewalk lights and sidewalk doors abutting upon such demised premises where the damage or injury results from the negligence of lessee.

9. That the lessee will not place, or permit to be placed in, upon or about the said premises any unusual or extraordinary signs, and will not conduct, or permit to be conducted, any sale by auction on the said premises. And it is hereby mutually covenanted and agreed that the lessors have reserved the exclusive right to the roof of the said premises.

10. That the lessee will permit the lessors and their agents to enter into and upon said premises at all reasonable times for the purpose of inspecting the same and for the purpose of maintaining the building in which the said premises are situate, or for the purpose of making repairs, alterations and additions to any portion of said building, including the replacing or reinforcing of any and all walls,

columns and girders, without any rebate of rent to the lessee for any loss of occupancy or quiet enjoyment of the premises thereby occasioned; and will permit the lessors at any time [16] after thirty (30) days prior to the expiration of this lease to place upon said premises any usual or ordinary "To Let" or "To Lease" signs.

11. The lessee agrees in the event the lessor brings an action or actions at law against the lessee to enforce the payment of any rent due, or to enforce any of the terms or conditions of this lease, or commence a summary action under the Unlawful Detainer Act of the State of California for the forfeiture of this lease, and possession of the demised premises, and prevail therein, to pay to lessor all attorney's fees and cost in said action or actions, such attorney's fees to be such as may be fixed by the court in such action; provided, however, if the lessor shall not prevail therein the lessee shall be paid like reasonable attorneys' fee incurred in and about the defense of any such action.

12. That if the lessor, for any reason whatsoever, can not deliver possession of the said premises to the lessee at the commencement of the said term, as hereinbefore specified, this lease shall not be void or voidable, nor shall the lessor be liable to the lessee for any loss or damage resulting therefrom; but in that event there shall be a proportionate deduction of rent covering the period between the commencement of the said term and the time when the lessee can deliver possession; provided, however, if possession of the

demised premises for any reason shall not be delivered to the lessee within the period of nine (9) months from and after said fifth day of June, 1927, then at the option of the lessee this lease may be terminated and all parties will be released from all liability hereunder.

13. That in the event of a destruction in whole or in part of the demised premises from and after the date hereof and/or during the term hereof, from any cause, the lessor at their sole cost and expense shall either cause the same to be repaired and restored or they will construct a new building without unnecessary delay, and allot to lessee the same space in said new building as is leased [17] hereunder, and upon the same rental, and the same terms as hereinprovided for; it being understood, however, that in case of partial destruction and repair the demised premises shall be repaired and returned to the lessee within sixty (60) working days, and, in the event of a new building being constructed, one hundred and twenty (120) working days; time lost by strikes, lockouts, delays occasioned by injunction proceedings or other causes beyond lessor's control shall be added to the above provided time. During the time that the lessee shall be wholly or partially out of possession of the demised premises by reason of the rebuilding or repair thereof, the rental and other moneys called for by the terms of the lease shall be abated or adjusted until the lessee again resumes, or is tendered, actual possession of all of its herein demised space.

14. The waiver by the lessor of any breach of any terms, covenants or conditions herein contained shall not be deemed to be a waiver of any subsequent breach of the same or any other terms, covenants or conditions herein contained.

15. The lessor does hereby covenant and agree with the lessee that the lessee, keeping and performing the covenants and agreements herein contained on the part of the lessee to be kept and performed, shall at all times during the said term peaceably and quietly have, hold and enjoy the said premises, without suit, trouble or hindrance from the lessor.

16. Any holding over after the expiration of the said term, with the consent of the lessors, shall be constructed to be a tenancy from month to momth, and shall otherwise be on the terms and conditions herein specified, so far as applicable.

17. The lessee hereby agrees at its own cost and expense to deliver to the lessors within thirty (30) days next succeeding the close of each calendar year of the lease term, a complete statement of the gross volume of business transacted by it or its said subsid- [18] iary or associate aforesaid, in that portion of the demised premises occupied by it for its own business, during such year; as also that of any store promoted, established or maintained by it or its subsidiary or associate, or in which either may become interested, within the prescribed distance hereinafter referred to; which said statement shall also contain a memorandum of all figures involved in the computation of any of the additional rentals to be paid

by the lessee hereunder. The lessee further agrees that the books of lessee that apply to its own business conducted in that portion of the demised premises actually occupied by it as herein provided including those of such subsidiary aforesaid as also those of any stores established, maintained or in which lessee may become interested within said proscribed distance, shall be open to lessors and their agents ar reasonable and convenient times and places, in the event that the lessors shall desire to inspect or check the same for the purpose of determining to their satisfaction the facts and figures upon which the percentage payments of rent are to be made as in this provided.

18. It is distinctly understood between the parties hereto that the lessors do not by this lease demise to the lessee any space under or in or upon any street or sidewalk adjacent to said demised premises, but the lessors give to the lessee, during the continuance of the term of this lease, and subject to all the covenants, provisions and conditions thereof, only such rights to the use of any space under, in or upon any adjacent street or sidewalk as the lessors themselves may have; and therefore it is further expressly agreed on the part of the lessee that if any rent or compensation shall be required by the said City and County of San Francisco, of any occupant of any such space, or any penalty exacted, or damages demanded thereof, then the lessee, and not the lessors, shall be liable for the same, and shall protect and indemnify the lessors from and against any claim,

demand or liability on account thereof for the time during [19] which said demised premises shall have been occupied by the lessee. And the said lessee further convenants and agrees to and with the said lessors that it will save the said lessors harmless from any and all claims by the said City and County of San Francisco or any other public authority, for compensation or damages by reason of the use or occupancy of, or intrusion upon any sidewalk or street or part thereof, adjoining said demises premises, by the said lessee, or anyone occupying said demised premises under the said lessee, or in connection with any building now or hereafter situate upon said demised premises during the time of the occupation of the demised premises by the lessee or those holding under it.

19. The lessee covenants and agrees that it will not, directly or indirectly, before or during the term of this lease promote, establish, maintain or be interested in or aid in the promotion, establishment or maintenance of any store or stores of any character located within a distance of seven hundred fifty (750) feet in any direction from the demised premises, unless lessee pays in like gold coin to lessor within thirty (30) days succeeding the close of each calendar year of the term hereof, and on account of the rental of the herein demised premises for the year immediately passed, eight per cent (8%) of the gross volume of business actually transacted in any of the said stores in said prescribed distance, less the amount of the actual rent of said store or stores; it

being specially understood and agreed that said eight per cent (8%) aforesaid shall be considered as rent for the use and occupancy of the herein demised premises and in addition to the other rent herein reserved.

Lessee further covenants and agrees that during all of the leased term hereby created, save and except any time during which its business is interfered with by strike, lockout, fire, earthquake or other act of God or calamity beyond its control, it will in every way conduct and maintain its business and its store in [20] the herein demised premises upon a plan and terms and in a manner as favorable as the plan, terms and manner upon which any other of its stores in San Francisco shall be conducted so that its store in these demised premises shall be insured at all times the full gross volume of business to which it may be entitled by reason of its location; provided anything in this paragraph to the contrary notwithstanding, the lessee shall not be obliged to conduct any branch or department of its business at its location in the corner space of the demised premises reserved to itself, which in its opinion shall be deemed unprofitable or impracticable for any reason, it being the intent of the parties hereto that the provisions of this paragraph shall apply only to such branches or departments of its business which it may elect actually to carry on and maintain in its said store.

20. It is agreed that the occupant, or occupants, of the demised premises may display thereon such

signs as lessee or occupant may deem advisable, including the privilege, if lessee or occupant so elects, to extend its signs up to the level of the lower floor of the second floor of said building.

21. This lease is made subject to the terms and provisions of that certain lease for the property in which the demised premises are situate, made and entered in to the 31st day of December, 1931, between John Tonningsen and Pauline E. Tonningsen, his wife, both of the City and County of San Francisco, State of California, parties of the first part, lessors, and O'Brien-Kiernan Investment Co., a corporation, and Wm. H. Woodfield, Jr., in equal undivided interests but not in partnership, lessees.

The lessors hereby jointly and severally represent and warrant that they are now the sole and unqualified owners of and hold good legal title to the entire leasehold interest covered by the terms of the aforesaid Indenture of Lease dated December 31, 1931, [21] and lessors warrant unto the lessee quiet and peaceful enjoyment of the premises covered by this Indenture of Lease. The lessors further agree to comply with and perform all of the covenants and conditions in said Indenture of Lease dated December 31, 1931, contained, and lessors agree upon default therefore that the lessee may pay the rents called for by said Indenture of Lease dated December 31, 1923, and may do any and all other things in order to protect its rights to the possession and enjoyment of the premises covered by said Indenture of Lease dated December 31, 1923.

22. The covenants and conditions herein contained shall, subject to the provisions as to assignment, apply to and bind the heirs, executors, administrators, successors and assigns of the parties hereof.

23. The word lessor wherein used in this lease shall include the plural, and shall be deemed to be equivalent of the word lessors.

IN WITNESS WHEREOF the parties hereof have hereunto and to a duplicate hereof, set their respective corporate and individual names, hands and seals, the day and year first above written.

O'BRIEN-KIERNAN INVESTMENT CO.
By R. J. O'BRIEN

President

By THOMAS KIERNAN

Secretary

WILLIAM H. WOODFIELD, JR.
SAMUEL WEINSTEIN

LESSORS

LOUIS K. LIGGETT COMPANY
By W. C. WATT

Vice President

By Y. CAELI

Secretary
LESSEE [22]

I, THOMAS KIERNAN, Secretary of O'BRIEN-KIERNAN INVESTMENT CO., a California corporation, do hereby certify that the following is a

true and correct copy of a resolution adopted at a regular meeting of the Board of Directors of O'BRIEN-KIERNAN INVESTMENT CO., duly called and held at the office of the company, room 605 Alexander Building, 155 Montgomery Street, San Francisco, on Thursday, March 17, 1926, at 2 P.M., at which meeting a quorum of the Directors were present and voting:

VOTED—That, R. J. O'BRIEN, President of O'BRIEN-KIERNAN INVESTMENT CO., be and he is hereby authorized, empowered and directed to execute and enter into the name and on behalf of this Company and under its corporate seal, a lease with LOUIS K. LIGGETT COMPANY, as lessee, for the corner store and basement premises situate on the northwest corner of Mission and Twenty-second Streets, in the City of San Francisco, forty-one (41) feet on Mission Street by one hundred (100) feet on Twenty-second Street, at such rental and for such terms and upon such covenants and conditions as to said R. J. O'BRIEN are deemed for the best interests of this company, and the act and *deemed* of said R. J. O'BRIEN in executing and delivering the aforesaid lease be and the same is hereby in all things, approved, ratified and confirmed as the act and deed of this company.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of said O'BRIEN-KIERNAN INVESTMENT CO. this 18th day of March, 1926.

THOMAS KIERNAN

Secretary O'BRIEN-KIERNAN INVESTMENT CO. [23]

I, C. C. MASON, Assistant Secretary of LOUIS K. LIGGETT COMPANY, a Massachusetts corporation, do hereby certify that the following is a true and correct copy of a vote adopted at a regular meeting of the Board of Directors of the LOUIS K. LIGGETT COMPANY, duly called and held at the office of the Company, Liggett Building, 41 East Forty-second Street, New York City, New York, on Monday, March 1st, 1926, at 2:30 o'clock P.M., at which meeting a quorum was present and voting:

"VOTED: That W. C. Watt, Vice-President, be and he hereby is authorized, empowered and directed to execute and enter into, in the name and on behalf of this Company, and under its corporate seal, a lease with O'Brien-Kiernan Investment Company, William H. Woodfield, Jr., and Samuel Weinstein, for premises situate on the Northwest corner of Mission and Twenty-second Streets, in the City of San Francisco, California, for such term, at such rental, and upon such covenants and conditions as said W. C. Watt shall, in his discretion, deem for the best interest of this Company; and that the act and deed of said W. C. Watt in executing and delivering the aforesaid lease be and the same is hereby in all things approved, ratified and confirmed as the act and deed of this company."

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of said LOUIS K. LIGGETT COMPANY, this 12th day of March, 1926.

C. C. MASON

Assistant-Secretary. [24]

We, E. LYLIA WOODFIELD (wife of WILLIAM H. WOODFIELD, JR.) and ELLEN WEINSTEIN (wife of SAMUEL WEINSTEIN) and each of us hereby consent to the making, execution and delivery of the above and foregoing lease from O'BRIEN-KIERNAN CO. (a corporation), WILLIAM H. WOODFIELD, JR., and SAMUEL WEINSTEIN to LOUIS K. LIGGETT COMPANY (a corporation) hereby ratifying, confirming and approving all of the terms, covenants, provisions and conditions thereof.

LYLIA WOODFIELD
ELLEN WEINSTEIN [25]

In consideration of the foregoing lease and One ($1.00) Dollar to the undersigned in hand paid by the lessors therein named, receipt of which is hereby acknowledged, United Drug Co. a corporation, does hereby covenant, promise and agree to and with said O'Brien-Kiernan Investment Company, William H. Woodfield Jr. and Samuel Weinstein, that the said Louis K. Liggett Company, lessee, shall well and truly pay all rents and perform and execute all the covenants and agreements therein contained on its part, and on its failure to do so in any particular the undersigned will forthwith pay unto said lessors without any previous demand, all rents accrued and all damages incurred by reason of said failure, including reasonable attorney's fees.

IN WITNESS WHEREOF, the undersigned cor-

poration has caused its corporate name and seal to be hereunto affixed this 27th day of February, 1926, by its officers thereunto duly authorized.

UNITED DRUG CO.
By CHARLES McCALLUM
By..[26]

I, A. W. Murray, Secretary of United Drug Company, do hereby certify that the following is a true copy of a vote passed at the Annual Meeting of the Board of Directors of that Company, duly called and held at the office of the Company. 43 Leon Street, Boston, Massachusetts, on Tuesday, March 9, 1926, at which meeting a quorum was present and voting:

GUARANTEE OF LEASE BETWEEN LOUIS K. LIGGETT COMPANY AND O'BRIEN - KIERNAN INVESTMENT COMPANY ET AL.

"Upon motion, duly made and seconded, it was unanimously VOTED: That the action of Charles McCallum, Vice-President of United Drug Company, in executing and delivering as of February 27, 1926, the guarantee by and in the name of United Drug Company of all the covenants and agreements on the part of the Louis K. Liggett Company in its lease with O'Brien-Kiernan Investment Company, William H. Woodfield, Jr. and Samuel Weinstein, covering the corner store and basement premises in a building situate on the northwest corner of Mission and 22nd Streets in the City of San

Francisco, California, be and the same is hereby approved, ratified and confirmed."

IN WITNESS WHEREOF I have hereunto set my hand and affixed the corporate seal of the United Drug Company this 10th day of March, 1926.

A. W. MURRAY
Secretary

[Endorsed]: Filed MAR 1 1934 [27]

[Title of Court and Cause.]

DEMURRER

Comes now the defendant, United Drug Company, a Delaware corporation, and demurring to plaintiff's complaint on file herein, for grounds of demurrer, specifies the following:

I.

That plaintiff's complaint does not state facts sufficient to constitute a cause of action.

II.

That plaintiff's complaint does not state facts sufficient to constitute a cause of action against this defendant.

III.

That plaintiff's complaint is uncertain in that it does not appear therein, nor can it be ascertained therefrom:

(a) Whether or not it is claimed that the lease, a copy of which is attached to the complaint and market "Exhibit A", was in full force and effect during any portion of the period beginning March 1, 1933 and ending October 31, 1933, the period during which rentals are claimed to be due from this defendant upon its assumption of the Massachusetts corporation's guaranty thereof; [28]

(b) How or in what manner or by virtue of what facts rentals for the period beginning April 1, 1933 and ending October 31, 1933 are claimed to be due from this defendant; and

(c) How or in what manner or by virtue of what facts an attorney's fee is claimed to be due from this defendant in this action.

IV.

That plaintiff's complaint is ambiguous for the reasons that it is uncertain as hereinabove set forth.

V.

That plaintiff's complaint is unintelligible for the same reasons that it is uncertain as hereinabove set forth.

WHEREFORE, having fully answered, defendant prays that it may be hence dismissed with its costs of suit herein incurred.

DATED: April 2, 1934.

CHICKERING & GREGORY
Attorneys for defendant United Drug Company, a Delaware corporation.

Due Service and receipt of a copy of the within is hereby admitted this second day of April, 1934.

OSCAR SAMUELS
YOUNG, HUDSON & RABINOWITZ
Attorney for..............................

[Endorsed]: Filed Apr 2 1934 [29]

District Court of the United States
Northern District of California
Southern Division

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 28th day of November, in the year of our Lord one thousand nine hundred and thirty-four.

PRESENT: the Honorable Harold Louderback, District Judge.

NEW MISSION MARKET,
vs. No. 19632
UNITED DRUG CO., etc

The demurrer to the complaint, having been submitted, now being fully considered, it is Ordered that the said demurrer be and the same is hereby sustained without leave to amend the bill of complaint. [30]

In the Southern Division of the United States District Court for the Northern District of California.

No. 19632-L

NEW MISSION MARKET,
a corporation,

Plaintiff,

vs.

UNITED DRUG COMPANY, a Massachusetts corporation, and UNITED DRUG COMPANY a Delaware corporation,

Defendants.

JUDGMENT OF DISMISSAL ON SUSTAINING DEMURRER TO COMPLAINT

The Court having sustained the demurrer of the defendant United Drug Company, a Delaware corporation, to the complaint without leave to plaintiff to amend, and having ordered that this cause be dismissed as to said defendant, and that judgment be entered herein accordingly:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action as against said United Drug Company, a Delaware corporation, and that said defendant go hereof without day; and that said defendant do have and recover of and from said plaintiff its costs herein expended taxed at $5.00.

Judgment entered this 8th day of December, 1934.

WALTER B. MALING,
Clerk. [31]

[Title of Court and Cause.]

PETITION OF PLAINTIFF, NEW MISSION MARKET, A CORPORATION FOR APPEAL FROM JUDGMENT MADE AND ENTERED DECEMBER 8, 1934, ON THE ORDER OF THE ABOVE COURT SUSTAINING THE DEMURRER OF THE DEFENDANT, UNITED DRUG COMPANY, A DELAWARE CORPORATION TO THE PLAINTIFF'S COMPLAINT WITHOUT LEAVE TO AMEND.

TO THE HONORABLE HAROLD LOUDERBACK, JUDGE OF THE ABOVE ENTITLED COURT:-

Now comes the plaintiff, NEW MISSION MARKET, A CORPORATION, by its solicitors, Young, Hudson & Rabinowitz, and Oscar Samuels, and believing itself to be aggrieved by the judgment of this court made and entered herein on December 8, 1934, upon the order of this Court sustaining, without leave to amend, the demurrer of defendant United Drug Company, a Delaware Corporation, to the complaint of plaintiff herein, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and for the reasons specified in the Assignment of Errors which is filed herewith, it does pray that this appeal be allowed, and that a transcript of the records, proceedings and papers upon which said judgment was made, duly authenticated, may be

sent to [32] the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 31st day of January, 1935.

OSCAR SAMUELS,
YOUNG, HUDSON & RABINOWITZ
Attorneys for the Plaintiff. [33]

Received a copy of the within Petition of Plaintiff for Appeal from judgment made and entered herein on December 8, 1934, this .... day of January, 1935.

....

Attorneys for Defendant, United Drug Company, a Delaware corporation.

[Endorsed]: Filed Jan 31 1935 [34]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS BY PLAINTIFF NEW MISSION MARKET, A CORPORATION, APPELLANT.

NOW COMES NEW MISSION MARKET, a CORPORATION, by its solicitors, YOUNG, HUDSON & RABINOWITZ, and OSCAR SAMUELS, and in connection with its Petition for Appeal from the Judgment of this Court made and entered in said cause on the 8th day of December, 1934, assigns for errors in said Judgment, and the proceedings of the Court therein and thereon, the following:-

1. That the court erred in determining and holding that the language in the lease involved in said action "In the event, however, that the lessee shall be adjudged a bankrupt, either by voluntary or involuntary proceedings, this lease shall immediately terminate, and the lessor shall have the right immediately to reenter said premises, and in no event shall this lease be treated as an asset of the lessee after adjudication of bankruptcy" constituted a conditional limitation, ipso facto terminating the lease upon the lessee being adjudicated a voluntary bankrupt, and was not a condition subsequent. [35]

2. That the court erred in determining and holding that said lease terminated automatically and without action upon the part of the lessor upon the adjudication of the lessee a voluntary bankrupt, and not determining and holding that said termination would not take effect until and unless the lessor availed itself of the right of re-entering the demised premises.

3. That the court erred in holding and determining, and construing the above-quoted clause to the effect, that the lessee could relieve its guarantor of responsibility upon the bond securing said lease by voluntarily seeking to be adjudicated a bankrupt.

4. That the court erred in holding and determining that said lease terminated, ipso facto, by reason of the clause contained therein above quoted without regard to or taking into consideration the bond

sued upon in the above-entitled action as a part of and supplementing said lease.

5. The court erred in disregarding the bond furnished by the lessee coincidently with the execution of said lease, and in resting its judgment upon and limiting the same to the afore-quoted provision of said lease.

6. The court erred in resting its judgment upon and limiting it to a construction of the afore-quoted provision of said lease without consideration of the remaining provisions of said lease.

7. The court erred in ordering and adjudging that plaintiff's complaint did not state a cause of action.

8. The court erred in ordering and adjudging that plaintiff's complaint did not state a cause of action against defendant, United Drug Company, a Delaware corporation.

9. The court erred in ordering and adjudging that the demurrer of defendant, United Drug Company, a Delaware corporation [36] to plaintiff's complaint in said cause, be sustained.

10. The court erred in ordering and adjudging that the demurrer of defendant, United Drug Company, a Delaware corporation to plaintiff's complaint in said cause, be sustained without leave to plaintiff to amend its complaint.

11. The court erred in rendering judgment in favor of defendant United Drug Company, a Delaware corporation, and against plaintiff herein.

DATED: at San Francisco, California, this 31st day of January, 1935.

OSCAR SAMUELS,
YOUNG, HUDSON & RABINOWITZ
Solicitors for Plaintiff and Appellant, New Mission Market, a corporation.

Received a copy of the foregoing Assignment of Errors this ______ day of January, 1935.

____

Attorneys for United Drug Company, a Delaware corporation.

[Endorsed]: Filed Jan 31 1935 [37]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL OF PLAINTIFF, NEW MISSION MARKET, A CORPORATION, UPON JUDGMENT RENDERED AND ENTERED HEREIN ON DECEMBER 8th, 1934, IN FAVOR OF DEFENDANT, UNITED DRUG COMPANY, A DELAWARE CORPORATION, AND AGAINST PLAINTIFF, NEW MISSION MARKET, A CORPORATION, SUSTAINING, WITHOUT LEAVE TO AMEND, THE DEMURRER OF SAID DEFENDANT UNITED DRUG COMPANY, A DELAWARE CORPORATION, TO THE COMPLAINT OF PLAINTIFF, NEW MISSION MARKET, A CORPORATION.

WHEREAS, the plaintiff, New Mission Market, a corporation, has presented its petition for appeal

from the judgment made and entered herein on December 8th, 1934, and has accompanied the same with its Assignment of Errors, and has prayed that said appeal be allowed;

NOW, THEREFORE, IT IS ORDERED that an appeal be allowed to said plaintiff, New Mission Market, a corporation, to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment made and entered herein on December 8th, 1934; and that said petition be granted upon the filing by the said plaintiff of a cost bond in the sum of Two Hundred and Fifty Dollars ($250.00).

Dated this 31st day of January, 1935.

HAROLD LOUDERBACK
District Judge.

[Endorsed]: Filed Jan 31 1935 [38]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States District Court for the Northern District of California, Southern Division:

You will please prepare for inclusion in the transcript for the record in the Circuit Court of Appeals for the Ninth Circuit on the appeal of

Plaintiff, NEW MISSION MARKET, a corporation, from the judgment of the above entitled Court made and entered in said cause on December 8th, 1934, whereby said Court sustained, without leave to amend, the demurrer of defendant, United Drug Company, a Delaware corporation, to the complaint of the plaintiff, a copy of each of the following pleadings, papers, decuments and proceedings, to-wit:

The Bill of Complaint of the plaintiff, NEW MISSION MARKET, a corporation;

The Demurrer interposed by the defendant, United Drug Company, a Delaware corporation, to the complaint of plaintiff; [39]

Order made by the above Court in said cause sustaining, without leave to amend, the demurrer of the defendant, United Drug Company, a Delaware corporation, to the complaint of plaintiff;

Judgment made and entered in said cause on or about the 8th day of December, 1934.

Petition of plaintiff, NEW MISSION MARKET, a corporation for an order allowing its appeal to the Circuit Court of Appeals, Ninth Circuit, from said judgment of December 8th, 1934;

Assignment of Errors filed herein by plaintiff, NEW MISSION MARKET, a corporation, on appeal;

Order dated January 31st, 1934, allowing the appeal of plaintiff NEW MISSION MARKET, a corporation, and fixing amount of Bond for Costs on Appeal;

Cost Bond on Appeal;
Citation on Appeal;
Praecipe for Record on Appeal;
together, in each case, with all endorsements and certificates thereto attached.

Dated: January 31st, 1935.

OSCAR SAMUELS,
YOUNG, HUDSON & RABINOWITZ
Solicitors for Plaintiff NEW MISSION MARKET, a corporation. [40]

Please furnish estimate of the Clerk's charges for making and preparing the foregoing copies of the record on file. Please give such estimate to the undersigned solicitors and counsel for Appellant at your earliest convenience.

OSCAR SAMUELS,
YOUNG, HUDSON & RABINOWITZ
Solicitors for Plaintiff, NEW MISSION MARKET, a corporation.

Received a copy of the within and foregoing Praecipe for Transcript of Record this 31st day of January, 1935.

CHICKERING & GREGORY
Solicitors for Defendant, UNITED DRUG COMPANY, a Delaware corporation.

[Endorsed]: Filed Feb. 1, 1935 [41]

[Title of Court and Cause.]

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, BALTIMORE

The premium charged for this bond is $10.00 Dollars per annum.

WHEREAS, the above named NEW MISSION MARKET, has prosecuted an appeal to the United States Circuit Court of Appeal for the Ninth Circuit, to reverse the judgment and decree of the District Court of the United States, in and for the Northern District of California, Second Division, in the above entitled cause.

NOW, THEREFORE, in consideration of the premises, the undersigned, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation duly organized and existing under the laws of the State of Maryland and duly authorized and licensed by the laws of the State of California to do a general surety business in the State of California, does hereby undertake and promise on the part of the Plaintiff, that the said Plaintiff will prosecute its said appeal to effect and answer all costs if they fail to make good to their plea and appeal, not exceeding the sum of TWO HUNDRED FIFTY AND NO/100 ($250.00) DOLLARS, to which amount it acknowledges itself justly bound.

And further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above entitled matter may, upon notice to the FIDELITY AND DE-

POSIT COMPANY OF MARYLAND, of not less than ten days, proceed summarily in the action or suit, in which the same was given to ascertain the amount which said Surety is bound to pay on account of such breach, and render judgment therefor against it and award execution therefor. [42]

Dated at San Francisco, California, this 31st day of January, A. D. 1935.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

[Seal] by GUERTIN CARROLL
Attorney-in-Fact

Attest C. A. BEVANS, Agent

(Signatures of Carroll and Bevans verified before F. R. Webb, a Notary Public Jan. 31, 1935.)

Approved this 1st day of February A. D. 1935

HAROLD LOUDERBACK
Judge, District Court

[Endorsed]: FEB 1 1935 [43]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, WALTER B. MALING, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 43

pages, numbered from 1 to 43, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of New Mission Market, vs. United Drug Company, etc. No. 19632-L, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $7.15 and that the said amount has been paid to me by the Attorneys for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 6th day of February A.D. 1935.

[Seal] WALTER B. MALING
Clerk.

J. P. WELSH
Deputy Clerk. [44]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America—ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To UNITED DRUG COMPANY, A DELAWARE CORPORATION:—

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit

Court of Appeals for the Ninth Circuit, to be holden at the City and County of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein NEW MISSION MARKET, a corporation, is appellant, and you are the appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. [45]

WITNESS, the Honorable HAROLD LOUDERBACK, United States District Judge for the Northern District of California, this 31st day of January A. D., 1935.

HAROLD LOUDERBACK
United States District Judge. [46]

Receipt of a copy of the within Citation on Appeal is hereby admitted this 31st day of January, 1935.

CHICKERING & GREGORY
Attorneys for United Drug Company, a Delaware corporation.

[Endorsed]: Filed FEB-1 1935 [47]

[Endorsed]: No. 7769. United States Circuit Court of Appeals for the Ninth Circuit. New Mission Market, a Corporation, Appellant, vs. United Drug Company, a Delaware Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed February 8, 1935.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7769

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NEW MISSION MARKET (a corporation), *Appellant,* vs. UNITED DRUG COMPANY (a Delaware corporation), *Appellee.*	}

BRIEF FOR APPELLANT.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

YOUNG, HUDSON & RABINOWITZ,
West Coast Life Building, San Francisco,
OSCAR SAMUELS,
Pacific National Bank Building, San Francisco,
Attorneys for Appellant.

FILED
DEC 6 - 1935

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No. 7769

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NEW MISSION MARKET (a corporation), *Appellant*, vs. UNITED DRUG COMPANY (a Delaware corporation), *Appellee*.	}

BRIEF FOR APPELLANT.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

I. STATEMENT OF THE CASE.

Appellant (plaintiff) is the assignee of the lessors in a certain lease which is set forth in full in the Transcript, pages 10 to 32. Defendant United Drug Company, a Massachusetts corporation, executed, coincidently with the execution of said lease, a guaranty of the obligations of the lessee in said lease, which guaranty is set forth in full in the Transcript, pages 32 and 33. Appellee (defendant United Drug Company, a Delaware corporation), subsequent to the execution of the lease and guaranty and prior to

the filing of this action, assumed and expressly agreed to perform all the obligations of defendant United Drug Company, a Massachusetts corporation, including the obligations provided for in the guaranty. (Tr. p. 7.)

Following said assumption by appellee of the obligations of said guaranty and prior to the filing of this action said lessee filed a voluntary petition in bankruptcy and was thereupon adjudicated a bankrupt. (Tr. p. 7.)

Appellee demurred to the complaint herein claiming that the adjudication in bankruptcy of the lessee constituted, under the terms of said lease, a conditional limitation *ipso facto* terminating the lease and thus relieving appellee from all liability on the guaranty assumed by it. The demurrer was sustained without leave to amend.

The sole question before the court is whether the lease and guaranty should be construed so as to constitute the adjudication in bankruptcy of the lessee a conditional limitation *ipso facto* terminating the lease, or whether the lease and guaranty should be construed so as to constitute the adjudication a condition subsequent which would terminate the lease only at the volition of the lessor.

II. SPECIFICATION OF ERRORS.

The errors relied upon by appellant are:

(1) That the court erred in determining and holding that the language in the lease involved in this

action "In the event, however, that the lessee shall be adjudged a bankrupt, either by voluntary or involuntary proceedings, this lease shall immediately terminate, and the lessor shall have the right immediately to re-enter said premises, and in no event shall this lease be treated as an asset of the lessee after adjudication of bankruptcy" constituted a conditional limitation *ipso facto* terminating the lease upon the lessee being adjudicated a voluntary bankrupt, and was not a condition subsequent.

(2) That the court erred in determining and holding that said lease terminated automatically and without action upon the part of the lessor upon the adjudication of the lessee a voluntary bankrupt, and not determining and holding that said termination would not take effect until and unless the lessor availed itself of the right of re-entering the demised premises.

(3) That the court erred in holding and determining, and construing the above-quoted clause to the effect, that the lessee could relieve its guarantor of responsibility upon the bond securing said lease by voluntarily seeking to be adjudicated a bankrupt.

(4) That the court erred in holding and determining that said lease terminated, *ipso facto,* by reason of the clause contained therein above quoted without regard to or taking into consideration the bond sued upon in the above-entitled action as a part of and supplementing said lease.

(5) The court erred in resting its judgment upon and limiting it to a construction of the afore-quoted

provision of said lease without consideration of the remaining provisions of said lease.

(6) The court erred in ordering and adjudging that plaintiff's complaint did not state a cause of action.

(7) The court erred in ordering and adjudging that the demurrer of defendant, United Drug Company, a Delaware corporation, to plaintiff's complaint in said cause, be sustained.

(8) The court erred in ordering and adjudging that the demurrer of defendant, United Drug Company, a Delaware corporation, to plaintiff's complaint in said cause, be sustained without leave to plaintiff to amend its complaint.

(9) The court erred in rendering judgment in favor of defendant United Drug Company, a Delaware corporation, and against plaintiff herein.

III. ARGUMENT.

A. INTRODUCTION.

This case closely approaches one of first impression. While it may be said that in a measurable degree the interpretation of any document is controlled by its peculiar provisions and ruling precedent is rarely or at all available, the instant case is in even a less chartered field. Not only have we a particular clause never before construed by any court, but we also have a further unprecedented situation, a coincident guaranty which must be considered and weighed in arriving at a construction of that clause.

The material portions of the lease are as follows:

"That the lessors, in consideration of the rents, covenants and agreements hereinafter contained, to be paid, kept and performed by the lessee, and upon the *condition* that each and all of the said covenants and agreements shall be fully kept and performed by the lessee, does by these presents lease, demise and let unto the lessee, for the purpose of conducting herein any lawful business, those certain premises situated in the City and County of San Francisco, State of California, and more particularly described as follows, to-wit: * * *

To have and to hold the said premises, with the appurtenances, unto the lessee, *for the term of twenty (20) years,* commencing on the fifth day of June, 1927, * * *" (Tr. pp. 11, 12.)

"And the lessee does hereby hire and take of and from the lessor the said premises, for the *said term* and at the said rental, *and does hereby covenant and agree with the lessor as follows*:

1. That the lessee will pay the said rent reserved to the lessor at the office of the lessor, or at such other place or places as may be designated from time to time by the lessor, at the times and in the manner provided as aforesaid for the payment thereof, without deduction, default or delay, and that *in the event of the failure of lessee so to do, or in the event of a breach of any of the other covenants herein contained on the part of the lessee to be kept and performed, it shall be lawful for the lessors to re-enter into and upon the said premises,* and every part thereof, and to remove all persons and property therefrom, and to repossess and enjoy the said premises as in the first and former estate of the lessors,

anything to the contrary herein contained notwithstanding." (Tr. p. 15.)

"*If the lessee shall be in default in the performance of any condition or covenant herein contained, and shall abandon or vacate said premises, besides other remedies or rights the lessors may have, it shall be optional with the lessor to relet the said premises for such rent and upon such terms as the lessor may see fit* it being understood that lessors shall not rent or lease any part of the demised premises at a rental less than the approximate prevailing rental at the time of such rental or leasing, and if a sufficient sum shall not be thus realized after paying the expenses of such reletting and collecting to satisfy the rent hereby reserved, the lessee agrees to satisfy and pay any deficiency, and to pay the expenses of such reletting and collecting." (Tr. p. 16.)

"The lessee may assign this lease as a whole to any subsidiary or associate of the lessee in the same line of general drug business as lessee and which subsidiary or associate shall acquire a substantial part of the assets of the lessee and all the drug stores operated, owned and/or controlled by lessee in San Francisco or San Francisco and elsewhere and whose gross annual business shall amount to at least Five Million ($5,000,000.00) Dollars per year; and lessee may sublet any part of the demised premises to any other person for any lawful business, provided that the corner portion, twenty-five (25) feet on Mission Street by eighty (80) feet on Twenty-second Street to be occupied by lessee for its own business shall not be underlet except to such associate or subsidiary as aforesaid. The lessee shall at all times, even

after any assignment, be and remain directly liable to pay the rent and other payments, and perform all the other covenants and conditions herein provided, it being understood that no assignment shall be made unless the assignee shall also assume full responsibility for the payment of the rent and other payments in this lease provided, and for the performance of all the covenants and conditions hereof. In the event, however, *that the lessee shall be adjudicated a bankrupt, either by voluntary or involuntary proceedings, this lease shall immediately terminate, and said lessors shall have the right immediately to re-enter said premises, and in no event shall this lease be treated as an asset of the lessee after adjudication of bankruptcy,* and if the lessee shall become insolvent or fail in business, or if a receiver shall be appointed to take charge of the business of lessee, or receive the rents of the demised premises, or if assignment be made for the benefit of creditors, then this lease may be terminated at once at the option of the lessors expressed in writing, in which event the lessors shall have the right immediately to re-enter the demised premises, and in no event shall this lease be treated as an asset of the lessee after the exercise of said option." (Tr. pp. 18, 19.)

"Lessee further covenants and agrees *that during all of the leased term hereby created, save and except any time during which its business is interfered with by strike, lockout, fire, earthquake or other act of God or calamity beyond its control,* it will in every way conduct and maintain its business and its store in the herein demised premises upon a plan and terms and in a manner as favorable as the plan, terms and man-

ner upon which any other of its stores in San Francisco shall be conducted so that its store in these demised premises shall be insured at all times the full gross volume of business to which it may be entitled by reason of its location;" (Tr. p. 27.)

The guaranty in question reads as follows:

"In consideration of the foregoing lease and One ($1.00) Dollar to the undersigned in hand paid by the lessors therein named, receipt of which is hereby acknowledged, United Drug Co., a corporation, does hereby covenant, promise and agree to and with said O'Brien-Kiernan Investment Company, William H. Woodfield Jr. and Samuel Weinstein, that the said Louis K. Liggett Company, lessee, shall well and truly pay all rents and perform and execute all the covenants and agreements therein contained on its part, and on its failure to do so in any particular the undersigned will forthwith pay unto said lessors without any previous demand, all rents accrued and all damages incurred by reason of said failure, including reasonable attorney's fees." (Tr. p. 32.)

Appellee's contention, based upon the wording of the particular clause, standing alone, dealing with bankruptcy, is that the adjudication of bankruptcy of the lessee *ipso facto* terminates the lease, while appellant contends that the proper construction of this clause, considering the lease as a whole, especially in light of the guaranty, is that the bankruptcy does not terminate the lease unless the lessor so elects.

B. THE GENERAL PRINCIPLES RELATING TO THE INTERPRETATION OF INSTRUMENTS SUPPORT APPELLANT'S POSITION.

At the outset it is well to consider certain well settled rules governing the interpretation of written instruments.

> "The scope, purpose, and effect of the lease must be determined from a consideration of it as a whole, rather than by a resort to any individual clause thereof."
>
> *Lang v. Pacific Brewery Co.* (1919), 44 Cal. App. 618.

> "The lease must be given such an interpretation as will make it effective in conformity with the intention of the parties."
>
> *Lang v. Pacific Brewery Co.* (supra).

> "When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made."
>
> *Code of Civil Procedure,* Section 1864.

> "Where several instruments are made as part of one transaction, they will be read together, and each will be construed with reference to the other."
>
> 13 *Corpus Juris* on Contracts, page 528, Section 487.

Of course the interpretation of specific clauses referring to the termination of agreements are subject

to the same rules. Thus it is stated in the Note in 13 *Corpus Juris,* pages 599-600:

> "The real intent and agreement of the parties on the matter of duration, as the same is made to appear by the contract, is to be enforced just the same as the other provisions thereof, so that on this point, as upon all others, we look to the contract in all its parts and entirety, as the evidence of the intent of the parties. It is a fundamental and well-recognized rule that in construing contracts, courts may look not only to the specific language employed, but also to the subject-matter contracted about, the relation of the parties thereto, the circumstances surrounding the transaction, or in other words, may place themselves in the same position that the parties occupied when the contract was entered into, and view the terms of the agreement in the same light in which the parties did when the same were formulated and accepted. Robson v. Mississippi Logging Co., 43 Fed. 364, 369."

The fundamental principle underlying all rules relating to the construction of leases and other instruments is that they be given an interpretation in conformity with the intention of the parties in light of all the circumstances.

There can be no doubt in the instant case that the parties did not intend to create a conditional limitation. From the lessor's point of view no advantage could be gained by having the lease automatically terminate rather than at the lessor's option. There is likewise no advantage from the lessee's point of view. If the lease were a valuable asset, and it must be presumed that the lessee believed it to be at the

time of its execution, certainly the lessee would not desire that it terminate automatically. On the other hand, if the lease should be a liability at the time of the bankruptcy of the lessee, the trustee in bankruptcy of the lessee could always disaffirm it at his option. Since no substantial benefit could accrue either to the lessor or to the lessee by inserting a clause in the lease which would cause the lease to terminate *ipso facto* upon the adjudication in bankruptcy of the lessee, it must be presumed that the parties did not intend a conditional limitation.

C. COURTS HOLD THAT A MERE ELECTION TO TERMINATE A LEASE EXISTS, NOTWITHSTANDING THAT ONE PARTICULAR CLAUSE, ISOLATED FROM THE REST OF THE LEASE, SPECIFICALLY PROVIDES FOR AN AUTOMATIC TERMINATION.

The generally accepted statement of the rule governing the interpretation of clauses terminating a lease upon the default of the lessee is as follows:

> "Leases which contain a forfeiture of the lessee's estate for nonpayment of rent, or breach of other condition, declare that on the happening of this contingency the demise shall thereupon become null and void, [*mean*] *that the forfeiture may be enforced by re-entry, at the option of the lessor.*" (Italics added.)
>
> *Ewell v. Daggs* (1883), 108 U. S. 143, 27 L. Ed. 682.

In 2 *Tiffany*—Landlord and Tenant, at page 1368 it is stated:

"It was at one time the law in England that, in case of a lease for years, a provision that the lease should become 'void' upon a default by the tenant in the performance of any particular stipulation, had the effect of terminating the tenancy immediately, without any action by the landlord, the courts thus in effect regarding such a provision not as a condition, but as a special limitation. This view has now, however, been repudiated in that country, it being recognized that the effect thereof was to enable the tenant, desiring to terminate the lease, to do so by merely making a default, he thus taking advantage of his own wrong. The rule now recognized there, and in most parts of this country, is that, even though the instrument of lease provides that the lease shall become void or terminate upon the breach of a stipulation by the lessee, such a breach does not terminate the tenancy until the landlord has in some way signified his election that it shall do so. *And such election by the landlord is a fortiori necessary in the case of a lease which provides for a right of re-entry* or a forfeiture on breach of a condition. The same principle has been applied in the case of a provision that on default by the lessee he should surrender possession. The effect of these various decisions seems to be that, whatever the language used, whether that adapted to the creation of a special limitation or a condition subsequent, it will, if the contingency referred to is in default by the tenant, be construed as creating an estate on condition subsequent, and not one on special limitation. In two or three states, however, the former English rule appears to be still adhered to, the provision that the lease shall be void or shall terminate operating according to its literal meaning." (Italics added.)

This rule has been applied even though an express option to terminate the lease is given to the lessor in other contingencies.

68 Bacon Street, Inc. v. Sohier (Mass. 1935), 194 N. E. 303. The lease there under consideration provided:

> "That the within lease shall cease, determine and become null and void upon the happening of either or all of the following contingenies: (a) In case at any time during the term of this lease the Lessee shall attempt to sell, pledge or dispose of said shares of capital stock or any part thereof or this lease * * * (b) In case at any time hereafter the Lessor shall determine * * * to sell the property of the Lessor in which the apartments hereby leased shall be, then and in such event this lease and all right and estate of the Lessee thereunder shall *at the option of the Lessor* terminate after the receipt of thirty * * * days' notice of the Lessor's determination aforesaid to sell * * *, and upon or prior to the expiration of thirty * * * days after receipt of such notice the Lessee shall quit and surrender up possession of said premises and this lease shall thereupon cease and determine."

In holding that the lease did not automatically terminate upon a transfer by the lessee under Subdivision (a) thereof the court said (page 305):

> "The defendant contends that the lease was terminated as a result of his assignment to Burr by virtue of the ninth clause in the lease which provides that the lease 'shall cease, determine and become null and void,' upon the happening of either of two contingencies, one of which is the attempt by the lessee to sell, pledge, or dispose of the lease, or his shares of stock. It is plain that this

proviso, following as it does the grant of a definite term, is not a conditional limitation. Similar provisions in leases are not uncommon especially when coupled with a right of re-entry. They have uniformly been construed as having been placed in the lease for the benefit of the lessor. It is wholly at his election whether he shall avail himself of the breach as a cause of forfeiture or not. Bartlett v. Greenleaf, 11 Gray. 98; Saxeney v. Panis, 239 Mass. 207, 210, 131 N. E. 331. It follows that the defendant did not terminate the lease by his violation of the condition contained in the ninth clause."

The same doctrine is followed in California.

Central Oil Co. v. Southern Refining Co. (1908), 154 Cal. 165. Plaintiff agreed to deliver oil to the defendant and the contract provided (p. 166):

"* * * This contract shall commence with the 1st day of July, 1904, and continue monthly thereafter for the period of one year and the violation of any of the terms or conditions thereof by either party hereto shall work a forfeiture thereof, and this agreement shall thereupon become void and of no effect."

The court said (pp. 166, 167):

"Upon appeal appellant's first and principal contention is that by force of the terms of the contract itself, when defendant violated it, the agreement became 'void and of no effect'; that this provision means that the violation terminated the contract and that consequently plaintiff had no right of recovery under it. Clearly appellant misconstrues the force of the language upon which it relies. That language means that by a violation of the terms of the contract the rights of the

party violating it cease, and as to that party and to that extent, the agreement becomes void and of no effect. It would be an extraordinarily unreasonable construction to give the language the meaning for which appellant contends. It would work the destruction of the contract itself and leave this solemn writing as an expression of the mere whim of the parties, for 'a promise which is made conditional upon the will of the promisor is generally of no value, for one who promises to do a thing only if it pleases him to do it, is not bound to perform it at all.' (9 Cyc. of L. & P., p. 618.) Performance by the party not in fault is always excused by the wrongful refusal to perform by the other party. The rights of the party in fault come to an end, but the contract is nevertheless kept in force so as to protect the rights of the innocent party and to enforce the obligations of the delinquent party. (Civ. Code, sec. 1511, 1512, 1514.) Such has uniformly been the construction put upon language such as this when found in contracts. (Wilcoxson v. Stitt, 65 Cal. 596 (52 Am. Rep. 310, 4 Pac. 629); Mancius v. Sergeant, 5 Cow. 271, note; Dana v. St. Paul Investment Co., 42 Minn. 196, (44 N. W. 55); Westervelt v. Huiskamp, 101 Iowa 202, (70 N. W. 125); Raymond v. Caton, 24 Ill. 123.)"

In *Wilcoxson v. Stitt* (1884), 65 Cal. 596, a similar situation was presented, and after the citation of many cases the court said (p. 600):

"In the light of these cases, and we find none to the contrary, we feel constrained to hold that the meaning of the clause under discussion in the agreement in this case is that such agreement is void only at the election of the plaintiff, who can avoid it or enforce it at his option."

The rule above set forth likewise governs the obligation of a guarantor.

In 16 *Ruling Case Law*, page 1118, the rule is stated as follows:

> "It is the general rule that provisions in leases for their forfeiture upon the breach of the lessee's covenants are for the benefit of the lessor, and he has the election to determine whether he will insist on the forfeiture or not. While in some early cases in England and in this country, a provision that the lease should become void or words of similar import, upon the nonperformance by the lessee of his agreements contained therein, were considered in the nature of conditional limitations terminating the lease ipso facto upon the happening of such contingency, it was soon realized that such a construction permitted the lessee to take advantage of his own wrong and thus escape liability on a burdensome lease, and it is now the established rule that such a provision is in the nature of a condition subsequent and entitled the lessor at his election to declare the lease forfeited or not * * * *So, though it is well settled that the liability of sureties is one strictissimi juris, it is held that a provision in a lease that it shall become void upon the lessee's nonpayment of rent when due does not affect the continued liability of a surety for the tenant if the lessor elects not to enforce a forfeiture.*" (Citing *Clark v. Jones*, 1 Denio (N. Y.) 516, 43 Am. Dec. 706.) (Italics added.)

D. BANKRUPTCY OF A LESSEE AND ESPECIALLY VOLUNTARY BANKRUPTCY IS A DEFAULT.

There is an obligation on the part of the lessee in every lease, either express or implied, not to default and becoming a voluntary bankrupt is necessarily a default on the part of the lessee.

> *Schneider v. Springman* (6th Circuit—1928), 25 Fed. (2d) 255:
>
> "* * * a condition will not unnecessarily be interpreted so as to permit one of the parties, by his own default, to bring about his release. Whatever might be thought of involuntary bankruptcy or liquidation, *it is clear that a voluntary bankruptcy would satisfy this condition and that such bankruptcy would be at the wish of the lessee. It cannot be assumed that the lessor would have acquiesced in the acquiring by the lessee of a right by which the lessee could, at his own election, defeat all further obligations.*" (Italics added.)

This is necessarily true since a person (or corporation) may file a petition in voluntary bankruptcy at any time he desires, and, regardless of his financial condition or his motive, may be adjudicated a bankrupt.

> *In re People's Warehouse Co.*, 273 Fed. 611:
>
> "Undoubtedly any person owing debts has the right to seek the bankruptcy court for the purpose of winding up his affairs, and his motive in doing so is immaterial. It also may be considered settled that on a voluntary petition an adjudication may be made as to a perfectly solvent person."

It is recognized by the courts that a person may capriciously file a voluntary petition in bankruptcy.

In the case of *In re Vadner*, 259 Fed. 614, one of the grounds for removal from the State to the Federal Court was that the defendant was adjudged a bankrupt. The court said (pp. 633, 634):

"Defendants place their main reliance on the fact that Vadner had been adjudged a bankrupt in this court. If this circumstance is sufficient to require the divorce case, the law case, and the equity suit to be removed to the federal court for Nevada, and each issue notwithstanding the judgment, to be tried de novo, it is apparent that the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544) affords a method of bringing into the federal tribunals civil suits without limit. Any person, except a municipal, railroad, insurance, or banking corporation, is entitled to the benefits of the Bankruptcy Act as a voluntary bankrupt. If such a person owes debts, however small, he may file a petition. It is not necessary for him to allege or prove insolvency; and, furthermore, his petition cannot be opposed by his creditors. Can such a person, finding himself involved in litigation, in which the decision has been, or is likely to be, adverse, by filing a voluntary petition in bankruptcy, cause the suits against him to be removed to a federal court and there tried anew? If under such circumstances the present litigation is removable from the Utah state court to the United States District Court for Nevada, what is to prevent a person who is sued in a superior court of California from residing for the greater part of the next six months in Maine, and then and there filing a petition in voluntary bankruptcy, and thus conferring on the United States District Court for Maine exclusive jurisdiction over the controversy pending in the California state court? The possible uses which might

> thus be made of the Bankruptcy Act are startling to contemplate."

The rule that bankruptcy is a default is especially applicable to the instant case in view of the following portions of the lease:

> "Lessee further covenants and agrees *that during all of the leased term hereby created, save and except any time during which its business is interfered with by strike, lockout, fire, earthquake or other act of God or calamity beyond its control,* it will in every way conduct and maintain its business and its store in the herein demised premises upon a plan and terms and in a manner as favorable as the plan, terms and manner upon which any other of its stores in San Francisco shall be conducted so that its store in these demised premises shall be insured at all times the full gross volume of business to which it may be entitled by reason of its location." (Tr. p. 27.)

It is indeed difficult to comprehend how the lessee can agree to conduct its store on the premises not only during the leased term, but "during *all* of the leased term" and yet not be in default if it voluntarily files a petition in bankruptcy. Especially is this so, since the only exceptions to the covenant are circumstances *beyond the lessee's control.*

It is to be noted that in the guaranty it is provided that the guarantor "does hereby covenant, promise and agree * * * [that the lessee] shall well and truly * * * execute all the covenants and agreements [in the lease] contained on its part."

The construction of the clause in the manner sought by appellee would permit the lessee to termi-

nate the lease at any time by its own wilful default. As was said in *Central Oil Co. v. Southern Refining Co.,* supra,

> "* * * It would be an extraordinarily unreasonable construction to give the language the meaning for which appellant contends. It would work the destruction of the contract itself and leave this solemn writing as an expression of the mere whim of the parties, for 'a promise which is made conditional upon the will of the promisor is generally of no value, for one who promises to do a thing only if it pleases him to do it, is not bound to perform it at all.' (9 Cyc. of L. & P., p. 618.)"

Therefore, under this well established doctrine, the bankruptcy of the lessee in the instant case cannot automatically cancel the lessee's obligations.

E. VIEWING THE LEASE AS A WHOLE, IT IS APPARENT THAT THE PARTIES INTENDED A CONDITION SUBSEQUENT.

Since it is fundamental that the proper construction of an instrument must be determined from a consideration of it as a whole, rather than by resort to any particular clause, it becomes important to briefly analyze the lease in question.

The first clause in the lease *expressly* states that the lease is executed by the lessor upon *condition* that each and all of the covenants and agreements of the lessee shall be fully kept and performed, for a fixed term of twenty years. (Tr. pp. 11, 12.) In the event of a breach "it shall be lawful for the lessors to re-enter". (Tr. p. 15.) Furthermore, in the event of

a default by the lessee and the lessee abandons or vacates the demised premises, "it shall be optional with the lessor to re-let the said premises" and the lessee agrees to satisfy any deficiency. (Tr. p. 16.) "Lessee further covenants and agrees that during *all* of the leased term created" it will maintain its business on the demised premises. (Tr. p. 27.) From these provisions and from the general tenor of the entire lease it is clear that the parties contemplated that the lease should continue for a definite term of twenty years, unless the lessor elected to terminate it for a default on the part of the lessee.

In accordance with the case of *Schneider v. Springman,* supra, the fact that voluntary bankruptcy of the lessee is an implied default brings bankruptcy within the purview of the general clause dealing with all defaults and specifically conferring upon the lessor an option to terminate. This being true, it is a logical corollary that the general clause is not to be disregarded where the specific clause is cast in the form given to it.

Yet solely relying upon particular language of the specific clause relating to bankruptcy in disregard of the rationale of the instrument, appellee seeks to override the palpable intention of the parties as disclosed by the entire lease, in direct violation of all well settled principles of construction.

F. THE COINCIDENTLY EXECUTED GUARANTY IRREFUTABLY CONDEMNS THE CONSTRUCTION SOUGHT BY APPELLEE.

The existence of the guaranty is of prime importance in determining the question before the court and is convincing almost to the degree of demonstration. The guaranty and lease were part of one transaction and both are to be considered in determining the proper construction of the lease. (Refer to rules of construction set forth supra.) The very purpose of the guaranty was to protect the lessors in the event that the lessee failed to perform the obligations of the lease. Then, and only then, would the guaranty be of any value, and yet the construction placed on it by the appellee would rob the appellant of the benefits of that protection from the moment it became available. In other words, the guaranty would die coincidently with the birth of the circumstance which would permit of recourse to it. The obvious object of lessors in requiring a guaranty was to protect themselves in the event of bankruptcy of the lessee or other circumstances affecting its financial responsibility, and yet opposing counsel would have that very event (in this case, voluntary bankruptcy) against which the guaranty afforded protection destroy that very protection. The principal of the guarantor could by its voluntary act confer upon the latter immunity from liability and deprive the obligee of any security whatever. A construction of the provision of the lease which would accomplish such a purpose demonstrates by its very statement that it is violative of the intention of the parties. A court will be loath to indulge in a conclusion carrying with it such an unusual and inequitable result without being forced into

the position by circumstances beyond its control. The language in the lease in question does not exact such an interpretation, but, to the contrary, the lease and guaranty jointly justify, if not require, the construction that the provision in question is a condition subsequent, operative only after exercise by the lessors of the option conferred upon them.

The only just and logical construction that can be placed upon the lease, particularly in light of the guaranty, is that the lessors had the right to terminate the lease and re-enter the premises, but that they were not required to exercise that right. Since they did not do so, the lease was at all times mentioned in the complaint in full force and effect and therefore the appellee is liable on its assumption of the guaranty.

G. THE SPECIFIC AUTHORITIES DEALING WITH THE BANKRUPTCY OF THE LESSEE DEFINITELY SUPPORT APPELLANT'S POSITION.

While, as we have stated, there is no case involving a lease so similar to that before this court that it can be cited as determinative of the issues here under consideration, there are some authorities which are of assistance. The case most nearly in point is *Schneider v. Springman* (6th Cir., 1928), 25 Fed. (2d) 255. The lease there under examination provided:

> "Should the lessee become bankrupt or go into involuntary liquidation, then, in such event, this lease shall become immediately forfeited, and all payments made thereon shall be forfeited to the lessor."

> "(10) This lease, at the option of the lessor, shall be void in case of any violation of any agreement or covenant herein contained."

In deciding that the quoted provisions constituted a condition subsequent, the court reasoned as follows:

> "(1, 2) Two considerations lead us to agree with the District Judge. One is that ordinarily the party for whose benefit a condition is provided has an election whether or not to insist upon the condition; and this principle applies to leases as well as to other contracts. 'Leases which * * * declare that on the happening of the contingency the demise shall thereupon become null and void [mean] that the forfeiture may be enforced * * * at the option of the lessor.' Ewell v. Daggs, 108 U. S. 143, 149, 2 S. Ct. 408, 412 (27 L. Ed. 682.) See, also, Taylor's Landlord and Tenant (8th Ed.) §492. We must look upon this condition as being dominantly for the benefit of the landlord. She had normally a complete legal right to the rent for the full term, and would not naturally yield it up; in the ordinary case of bankruptcy, it may or may not be in the interest of the lessor to have a forfeiture, and the right to elect would not naturally be given up. Nor was it seemingly for the benefit of the lessee to have the lease terminated. Often, an existing lease is an asset most valuable to the lessee, and he would not naturally intend in advance to deprive himself of that asset. Another aspect of the same reason is found in the correlative rule that a condition will not unnecessarily be interpreted so as to permit one of the parties, by his own default, to bring about his release. Whatever might be thought of involuntary bankruptcy or liquidation, it is clear that a voluntary bank-

ruptcy would satisfy this condition and that such bankruptcy would be at the wish of the lessee. It cannot be assumed that the lessor would have acquiesced in the acquiring by the lessee of a right by which the lessee could, at his own election defeat all further obligations.

It is true that, if the rule is the same in Kentucky as in Ohio, and if therefore a claim for further rent is not provable in bankruptcy nor dischargeable therein (Wells v. Twenty-first St. [C. C. A. 6] 12 F. [2d] 237), the lessee might look forward to a benefit by providing that the lease should be by bankruptcy absolutely ended; but such possibility is not strong enough to be impressive as an aid to determining the intent of the parties.

* * * * * * *

(4) The further clause (10), which expressly provides that the lease shall be void at the option of the lessor in certain events, shows, it is true, that the parties knew how specifically to make the option of the lessor the controlling element when they wished to; but this consideration alone is not persuasive that they did not intend the lessor to have another option, otherwise appropriate, merely because the option clause was not also there contained. Indeed, since there is at least an implied agreement contained in the lease not to become bankrupt, the express option of clause 10 might well be extended to the contingency of bankruptcy."

The court stated that an additional reason for its decision was that the word "forfeited" was used rather than "terminated" but this reason was not essential to the court's ultimate decision. It was simply added to the reasons already held sufficient.

In the case of *Re Roth & Appel* (C. C. A., 1910), 181 Fed. 667, the lease contained the following provision:

> "In case the lessee is declared bankrupt, the lease shall terminate, and the lessor has a right to re-enter * * *"

The court said:

> "Notwithstanding the provision that the lease should terminate in case the lessees should be declared bankrupt, and the lessor should have the right to re-enter, the lease was undoubtedly terminable by the re-entry, and not by the bankruptcy. Re Ells (D. C.) 98 Fed. 967. But the lessor was not obliged to re-enter, and whether he would do so or not was manifestly dependent upon uncertainties."

These cases fully support appellant's contentions, and it must at all times be remembered that appellant's position is strongly fortified by the guaranty heretofore referred to. If the court will not treat bankruptcy as a conditional limitation under the wording of the leases in the cited cases, certainly it cannot be a limitation in the instant case when consideration is given to the required guaranty.

Appellee relies upon the case of *Jandrew v. Bouche* (1928), 29 Fed. (2d) 346. In that case the lease provided:

> "This lease shall be personal to the lessees and shall not inure to the benefit of any receiver or trustee in bankruptcy as an asset of said lessees."

The court at the outset pointed out that if the lease were not terminated under the law of Texas, where

the case arose, the lessor would have a rental lien for the twelve month period immediately subsequent to the bankruptcy, which lien would absorb the entire assets of the bankrupt's estate. The very statement of this fact by the court necessarily means that the court considered it to be material and that other creditors would suffer by holding this clause to be other than a conditional limitation. It must be considered that the court was therefore inclined to hold that the clause in question created a conditional limitation, if it were possible to do so.

It will be conceded, of course, that the language in the *Jandrew* case differs radically from the language in the lease presented to this court, and it is indisputable that the language in that case is stronger than in the instant case. Necessarily the clause in the Jandrew lease that "the lease shall be personal to the lessees" was one of the pivotal factors controlling the court's determination. Similar language, or language of like import, is absent from the lease here under consideration. Furthermore, the clause conferring a right to re-enter in a certain event can only signify that a privilege, which otherwise would not exist, has been extended to the lessor to be exercised if it so desires. (See *Re Roth & Appel,* supra.) This clause was not embraced within the provisions of the lease before the court in the *Jandrew* case and its absence is of major moment in distinguishing the two cases.

The court in the *Jandrew* case stated:

> "The question presented is solely as to the construction of the lease. It is not free from

> doubt and we are not advised of any controlling decision in point."

That this language weakens the opinion is self evident. When we are aware of the fact that the two contrary decisions of the United States Circuit Court of Appeals, cited above, were in existence when that opinion was written, grave doubt must necessarily arise as to whether or not the court's decision would have been the same had those two cases been presented to it. Furthermore, the difference between the situation there presented and in the instant case is so pronounced as to practically nullify any force which the case might otherwise have. Here there is submitted for the construction of the court a lease and a concurrently executed guaranty. In the *Jandrew* case the court had before it only a lease. The vital effect of the guaranty has heretofore been explained.

It is well to note that while the *Jandrew* case was decided a few months later than the case of *Schneider v. Springman,* supra, it can be given no greater weight merely because of the time element, for, as already shown, the *Schneider* case was not before the court which decided the *Jandrew* case. Rather should the *Schneider* case be controlling, for there the court gave serious consideration to the question involved and set forth its reasons in full, while in the *Jandrew* case merely the conclusion of the court was given and the court admitted that the question was "not free from doubt".

Of course, in a case in which the court is faced with a question solely of construction, as in the instant case, no one decision can be conclusive merely

because of the final result reached by the court, unless the circumstances are similar, for necessarily differentiating circumstances call for different conclusions. The *Jandrew* case and the one here involved are so variant in facts and circumstances that any argument which places its main reliance upon a supposed analogy between them defeats itself.

H. ANALYSIS OF THE PRINCIPAL CONTENTIONS OF APPELLEE RAISED IN THE COURT BELOW.

Appellee necessarily relies upon the case of *Jandrew v. Bouche,* supra, which, as heretofore shown, is wholly insufficient to support its contention that the voluntary bankruptcy of the lessee in the instant case is a conditional limitation.

Appellee's principal argument is that the clause dealing with bankruptcy appears on its face to be a conditional limitation, especially in light of the option granted to the lessor in reference to other situations. We have already seen that even though the language of a particular clause in a lease reads as though the default of the lessee constitutes a conditional limitation, the courts will construe the lease so that it will not terminate except at the instance of the lessor. We have shown further that bankruptcy, especially voluntary bankruptcy, is a default of the lessee. Thus, even assuming that the clause is so worded as to be a conditional limitation, that in itself is not sufficient.

The fact that an option is granted in the event of other contingencies lends little support to appellee's contention. In the case of *Schneider v. Springman,*

supra, a similar situation was presented and the court said:

> "The further clause (10), which expressly provides that the lease shall be void at the option of the lessor in certain events, shows, it is true, that the parties knew how specifically to make the option of the lessor the controlling element when they wished to; but this consideration alone is not persuasive that they did not intend the lessor to have another option, otherwise appropriate, merely because the option clause was not also there contained."

In *68 Beacon Street, Inc. v. Sohier,* supra, the lease was so worded that it would appear to cease *ipso facto* upon an assignment by the lessee of the lease or certain corporate securities, while in the same paragraph the lessor was specifically granted an *option* to terminate the lease in another contingency. Yet the court held that upon an assignment by the lessee it was wholly at the election of the lessor whether or not the lease be terminated.

The mere fact that the lease expressly grants to the lessor an option to terminate the lease in the event of certain contingencies does not deny to the lessor a similar option in the event of the lessee's voluntary bankruptcy.

Again, it must be kept in mind that the clause in question gives to the lessor a right of re-entry. If appellee's claim that the clause should be construed as a conditional limitation were accepted, the lessor would have the right to re-enter immediately without words to that effect. If unaccepted, then the clause properly provides that the lessor could immediately

exercise the right of re-entry at its will. To ascribe any purpose whatever to the right of re-entry, the court must conclude that there is created a condition subsequent and not a conditional limitation.

Appellee emphasized the language "in no event shall the lease be treated as an asset of the lessee after adjudication of bankruptcy". To this, the response was made that the emphasized language follows and is associated with the re-entry clause and the natural interpretation of the two is that in the event the right of re-entry is exercised, "*then* in no event shall the lease be treated as an asset of the lessee after adjudication of bankruptcy".

It was argued by appellee that in construing the lease reliance should be had on and limited to the language in question, and that there should be neither insertion of a word nor disregard or deletion of a word or phrase, and the court should not construe the clause as though it were in the form above set forth with the inclusion of the word "then". This argument by appellee leaves it on the horn of the dilemma. If its position be recognized, the re-entry clause cannot be disregarded and must be given cogency, with the consequence that we then have an undeniable condition subsequent, for it can only signify that a privilege has been extended to a lessor exercisable if it sees fit. If, on the other hand, no significance is to be ascribed to the re-entry clause, we are running counter to the very principle of construction which the appellee invokes. Certainly that principle, if applicable at all, must be utilized in the instance of both parties. It cannot be available to appellee and unavailable to appellant.

In the lower court it was argued that a lease is presumably drawn by the lessor and therefore all doubts should be resolved against him. If this presumption were available to the appellee, it would be entitled to little, if any, weight in light of the overwhelming proof that the clause in question is a condition subsequent.

In the final analysis the lease in its entirety, together with the guaranty, so eloquently voices an intention of the parties contrary to that for which the appellee strives, that a proper interpretation cannot be influenced by a bare presumption of the character by appellee suggested. However, a presumption such as this cannot be utilized upon demurrer—it is a rule of evidence.

See,

Lassing v. James, 107 Cal. 348;
Irish v. Sunderhaus, 122 Cal. 308;
Herzog v. Atchison etc. R. R. Company, 153 Cal. 496;
Pettit v. Forsyth, 15 Cal. App. 149.

I. CONCLUSION.

Appellee places a technical construction upon a particular clause in the lease and, without more, seeks to maintain its position. In order to support appellee's contentions, we must, first, disregard the intention of the parties, for, as already shown, the court cannot reasonably find that the parties intended to create a conditional limitation.

Secondly, we must eliminate the right of re-entry granted in the particular sentence in question, since it necessarily gives to the lessor a privilege which may or may not be exercised.

Thirdly, we must disregard all other portions of the lease for, considered as a whole, it is clear that the parties intended that the lease should continue for its full term without the right of the lessee to cancel same.

Fourthly, we must eliminate from our consideration the guaranty, as it is inconceivable, as heretofore argued, that the lessor would have sought a guaranty if the guaranty could be voided by the wilful act of the lessee.

Fifthly, we must disregard every conceivable rule of construction and especially the long established doctrine that a default of a lessee will not *ipso facto* terminate a lease.

Sixthly, we must disregard the well considered case of *Schneider v. Springman,* supra, and rely upon the case of *Jandrew v. Bouche,* supra, which is readily distinguishable and wholly insufficient.

Seventhly, we must disregard every principle of justice and fair dealing if we are to allow a person to

wilfully violate a sacred obligation, and by such violation confer immunity upon itself and its guarantor.

Certainly no valid reason can possibly be advanced for so flagrantly violating every rule of construction, every principle of law, the clear intention of the parties, and every elementary principle of fairness.

Dated, San Francisco,
December 6, 1935.

Respectfully submitted,

Young, Hudson & Rabinowitz,
Oscar Samuels,
Attorneys for Appellant.

No. 7769

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NEW MISSION MARKET (a corporation),
Appellant,

vs.

UNITED DRUG COMPANY (a Delaware corporation),
Appellee.

BRIEF FOR APPELLEE.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

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No. 7769

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

New Mission Market (a corporation),
Appellant,

vs.

United Drug Company (a Delaware corporation),
Appellee.

BRIEF FOR APPELLEE.*

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

I.

STATEMENT OF THE CASE.

Appellant, plaintiff below, is the assignee of the lessor's interest in a certain lease (hereinafter referred to as the Liggett lease), set forth in full in the transcript pages 10 to 32. This appeal is from the judgment of the United States District Court entered upon an order sustaining without leave to amend the demurrer of appellee (defendant) to appellant's complaint.

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*All italics throughout this brief are those of the appellee except where otherwise stated.

Appellant's complaint alleges that Louis K. Liggett Company, the lessee under the Liggett lease was adjudicated a bankrupt on March 31, 1933; that appellee, United Drug Company, a Delaware corporation, assumed the obligations of United Drug Company, a Massachusetts corporation, upon the latter's guaranty of the rentals of the Liggett lease; that rentals for the months of March, 1933 to October, 1933 inclusive were unpaid by either lessee or by lessee's guarantor or by appellee.

Appellee's demurrer challenged the sufficiency of the complaint upon the ground that the complaint failed to state a cause of action against appellee for the latter's liability on its predecessor's guaranty for the reason that the principal obligation was extinguished, that is, the lease had terminated by its own terms upon the date lessee was adjudicated a bankrupt.

II.

ARGUMENT.

A. EXPRESS PROVISIONS IN A LEASE MUST BE GIVEN THE EFFECT OBVIOUSLY INTENDED.

The Liggett lease contained the following provision (Tr. p. 19):

> *"In the event, however, that the Lessee shall be adjudicated a bankrupt, either by voluntary or involuntary proceedings, this lease shall immediately terminate, and said lessors shall have the right immediately to re-enter said premises, and in no event shall this lease be treated as an asset of the lessee after adjudication of bankruptcy,*

> and if the lessee shall become insolvent or fail in business, or if a receiver shall be appointed to take charge of the business of lessee, or receive the rents of the demised premises, or if assignment be made for the benefit of creditors, then this lease may be terminated at once at the option of the lessors expressed in writing, in which event the lessors shall have the right immediately to re-enter the demised premises, and in no event shall this lease be treated as an asset of the lessee after the exercise of said option."

Under the most fundamental rules of law the effect of a lease must be ascertained from the words employed therein.

3 *Remington on Bankruptcy* (3rd ed.), sec. 1222, p. 67, contains the following statement:

> "The lease may be so worded that it will ipso facto terminate on the bankruptcy itself, without the necessity of any declaration of forfeiture, but it may also be so worded as to require such declaration." (Citing *Matter of Jorolemon-Oliver Co.*, 213 Fed. 625 (C. C. A. 2nd, 1914) as being impliedly to that effect.)

No public policy exists that prevents parties to a lease providing therein for the termination thereof upon the happening of any event they may select.

> *Devonshire v. Langstaff, et al.*, 83 Cal. App. Dec. 761 (3rd Cal. App. District (11/25/35)).

In this case judgment for lessees was affirmed in an action brought by lessors to recover rent and taxes after lessor's attempted recall of a written notice under a lease containing the following provision:

"In case Lessees shall fail to perform any condition, covenant or obligation under the terms of this lease, * * * at the election of Lessors, Lessors may terminate this lease by notifying Lessees not less than thirty days prior to the date of the proposed termination of the fact of said breach * * *, the lease shall terminate ipso facto, and without further act on the part of Lessors, * * *".

At page 763 the court said:

"Appellant claims that the judgment in favor of defendant can be sustained only upon the doctrine of election or the doctrine of conditional limitation, and then cites numerous authorities to show that neither doctrine is applicable to the case at bar. However, the judgment need not rest upon either doctrine suggested by appellant, but rather upon the contractual relationship of the parties and their specified method of termination of the lease. There is nothing stipulated in the lease that is beyond the power of the parties. *There is nothing in the contractual provision for the termination of the lease that violates any rule of public policy, and that parties may, in their lease, provide for the termination thereof upon notice different from and superseding that prescribed by the code is well established.* (*Conner v. Jones,* 28 Cal. 60; *Watkins v. McCartney,* 57 Cal. App. 643, 207 Pac. 909; *Buhman v. Nickels & Brown Bros.,* 1 Cal. App. 266; *Jameson v. Chanslor-Canfield Midway Oil Co.,* 176 Cal. 1, 167 Pac. 369; *Wisner v. Richards,* 62 Wash. 429, 113 Pac. 1090; sec. 1946, Civ. Code.)"

The law as to contracts terminating *ipso facto* upon the happening of a certain event under the terms of the contract is analogous.

13 *Corpus Juris on Contracts,* sec. 620, p. 599:

"Duration of Contract in General. Where an agreement expressly stipulates that it is to continue for a particular time or until the happening of a particular event, it of course terminates in accordance with its terms, and not sooner. Provisions limiting the duration of contracts are to be so construed as to effectuate the mutual intention of the parties as evidenced by the language employed. * * *".

5 *Page on Contracts* (2nd ed.), sec. 2598, p. 4569:

"Contract Conditioned on Future Event—In General. A contract may provide in express terms that the happening or not happening of some specified event after the contract is made, shall operate as a termination of some or all of the rights thereunder. Since a condition of this sort is to take place after the contract is made, there is no doubt that it is a true condition, and full effect is given to it in accordance with its terms, subject, however, to the general rule that a condition which operates as a forfeiture is construed strictly in favor of the party against whom it is sought to exact the forfeiture. The termination of a contract by one party in accordance with a provision therein, is not breach, and does not discharge the adversary party if the termination was not by the terms of the contract to act as a discharge, and does not entitle the adversary party to damages. * * *".

Calif. Code of Civil Procedure, sec. 1858, provides:

"In the construction of a statute or instrument, the office of the judge is simply to ascertain and

declare what is in terms or in substance contained therein, *not to insert what has been omitted, or to omit what has been inserted;* and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

It is true, to be sure, that in many instances, bankruptcy of the lessee does not terminate the lease because either there is no lease clause so providing in which event the lease is not terminated or else the lease clause expressly provides that termination on bankruptcy of a lessee is at the option of the lessor, in which event the lease is not terminated until the exercise of that option.

1 *Tiffany on Landlord and Tenant*, p. 94:

"Bankruptcy. The bankruptcy of the lessee does not, by the great weight of authority, have the effect of terminating the tenancy, *provided the lease contains no provision to that effect,* and unless the trustee in bankruptcy refuses, as hereafter explained, to accept the leasehold interest, it will pass with the bankrupt's other property to such trustee."

To the same effect see:

Kirstein Holding Co. v. Bangor Veritas, Inc., 163 Atl. 655 (Me. 1933),

in which case at page 656 the court said:

"A lease is not terminated by the adjudication in bankruptcy of the tenant, *unless there be provision to that effect* in the indenture, and, if the trustee renounces the lease, the relations of landlord and tenant between the bankrupt and his

lessor are not disturbed, the bankrupt retaining 'the term on precisely the same footing as before, with the right to occupy, and the obligation to pay rent'."

However, as appellee has pointed out, under the explicit and unambiguous language of the Liggett lease to the effect that:

> "In the event, * * * the lessee shall be adjudicated a bankrupt, * * * this lease shall immediately terminate, * * * and in no event shall this lease be treated as an asset of the lessee after adjudication of bankruptcy, * * *"

this lease was terminated as to lessee upon adjudication of lessee as bankrupt and the obligations of lessee to pay rentals terminated therewith as to rentals accruing thereafter.

B. EXPRESS PROVISION IN LIGGETT LEASE AS ANALYZED AMOUNTS TO A CONDITIONAL LIMITATION AS DEMONSTRATED BY COMPARISON WITH LEASE PROVISION INVOLVED IN CASE OF JANDREW v. BOUCHE.

Appellee's contention is that the Liggett lease provision for termination on lessee's adjudication in bankruptcy constitutes a conditional limitation and not a condition subsequent. Although the plain meaning of the provision itself is the strongest support for appellee's contention, nevertheless there are decisions which lend further support.

Jandrew v. Bouche, 29 Fed. (2d) 346.

This decision of the Circuit Court of Appeals for the Fifth Circuit involved the ruling of a referee

refusing to allow the lien claim of the landlord for rentals against the bankrupt estate of the lessee which was reversed by the District Court and the ruling of the District Court was, in turn, reversed by the Circuit Court of Appeals for the Fifth Circuit, the last mentioned court holding that the lease contained a conditional limitation and not a condition subsequent solely by reason of the following lease provision:

> "* * * this lease shall be personal to the lessees and shall not inure to the benefit of any receiver or trustee in bankruptcy as an asset of the said lessees."

In the court below it was pointed out and it is now pointed out that the clause in the Liggett lease contains all that the clause in the *Jandrew* case contained and *much* more. Appellee pointed out to the court below and it now repeats that the Liggett lease contains the following significant features:

(1) The clause appears in a paragraph granting permission to the lessee to assign only to a subsidiary or associates of the lessee in the same line of drug business. The fact that the clause appears in the paragraph pertaining to assignments indicates lessors' desire that the lease should be personal to the lessee.

(2) The clause is introduced by the words "In the event, however," which are words of familiar use to legal draughtsmen; they are commonly used to denote that they introduce a clause which shall supersede other clauses in any way repugnant.

(3) The clause is not a part of a covenant by the lessee only but is worded as a conditional limitation

prescribing that in the event of bankruptcy, the lease shall terminate.

(4) The clause contains the unambiguous phrase "shall immediately terminate" and is not qualified by an option to lessor to terminate as is the following clause which appears later in the same paragraph and which refers to lessee's insolvency, failure in business, appointment of a receiver, or assignment for benefit of creditors. (See paragraph (10), infra.)

(5) The clause states that the lease shall terminate in the event the "lessee shall be adjudicated a bankrupt, either by *voluntary or involuntary* proceedings", which shows that the parties to the lease did *not* consider voluntary adjudication in bankruptcy as being *a default* under or breach of the lease *but* treated it as *an event,* the occurrence of which limited the term.

(6) The clause states that "*in no event* shall this lease be treated as an asset of the lessee after adjudication of bankruptcy", showing that the parties intended this lease to be personal to the lessee and is substantially the same language as was used in the lease clause involved in the case of *Jandrew v. Bouche,* supra.

(7) The clause contains the provisions that in event of adjudication the lease shall terminate "and said lessors shall have the right immediately to re-enter said premises", showing that the parties intended that the lessors should not be delayed by any necessity for written notice to terminate and should not be placed in a position in which the trustee in bankruptcy of the lessee could prevent the lessors'

immediate re-entry. Furthermore, the phrase is in the conjunctive, not the disjunctive, and supplements the obvious intention of the parties to prohibit an assignment by operation of law to a bankruptcy trustee.

(8) A *subsequent clause* in the same sentence *does grant an option* to the lessor to terminate in event of lessee's insolvency, failure in business, appointment of receiver or assignment for benefit of creditors as distinguished from bankruptcy.

(9) This latter clause is complete in itself since it contains the further provision that "in no event shall this lease be treated as an asset of the lessee *after the exercise of said option*".

(10) *The clauses expressly discriminate between the event of either lessee's insolvency, failure in business, receivership, or assignment* for benefit of creditors *and the event of lessee's adjudication in bankruptcy.* In the event of either of the first named happenings, the lessor is granted an option. In the event of adjudication as a bankrupt, either by voluntary or involuntary proceedings, the lease expressly provides for its immediate termination with no option. *Appellant fails to answer the question* which so clearly presents itself in the language of the lease: *Why was such discrimination made if the parties did not so intend? Appellant also fails to answer the question: Why,* if such discrimination *was not so intended, was not bankruptcy included in the same clause with insolvency,* failure in business, receivership, etc.? Bankruptcy was placed in a separate clause differently worded. There could have been no oversight because

one provision directly follows the other. It was done *intentionally* and no reason can be assigned except that the termination of the lease in case of bankruptcy was *not* to be *optional but* was to be a conditional *limitation* terminating the leasehold without further act of the parties.

C. APPELLANT'S ATTEMPTS TO DISTINGUISH BETWEEN JANDREW v. BOUCHE AND CASE AT BAR ARE FUTILE.

Appellant attempts, on pages 26-29 of its brief, to distinguish the case of *Jandrew v. Bouche,* supra, from the case at bar on three grounds which we shall answer as we separately consider them.

(1) Appellant states that in the *Jandrew* case, if the court had determined that the lease continued, the landlord's lien claim would have absorbed the whole estate. It is true that on page 347 of the opinion in concluding the statement of facts the court stated in passing that "The lien was allowed to the extent of the proceeds of the assets, approximately $5000.00, which will absorb the entire estate". No reference is made to this fact in dealing with the legal question involved and appellant has no basis to conclude that the court was influenced in any manner thereby. Furthermore, the opinion does not even contain a statement that there were any other creditors to whom the assets would be distributed in the event the claim was disallowed.

(2) Appellant contends that the court's decision is weakened by its own language stating that the ques-

tion was not free from doubt and that there was no *controlling* decision in point. Appellant cannot thus avoid the conclusive effect of the *Jandrew* case upon the case at bar. Since the decision of the *Jandrew* case there is for this court a controlling decision, to-wit, the *Jandrew* case, and if in that case the question was not free from doubt, the facts in this case are so much stronger in favor of the defendant that had they been before the court in the *Jandrew* case, the question would have been free from doubt.

Appellant assumes that the Circuit Court of Appeals for the Fifth Circuit did not have "the contrary decisions" of *Schneider v. Springmann,* infra, and *In re Roth and Appel,* infra, presented to them and from that weak premise of assumption it draws the conclusion that grave doubt must necessarily arise as to whether or not the court's decision would have been the same had those cases been presented to it.

The reasoning is fallacious in that (a) it does not appear that the two cases were *not* considered by the court, and (b) since they are absolutely distinguishable on the facts their citation or consideration would have been of little value and not controlling in any event. (infra, pp. 16, 17 and 18.)

(3) Appellant states that the concurrent execution of the guaranty by the United Drug Company distinguishes the two cases. This cannot be so. The guarantor can be held to no greater liability than the lessee, irrespective of when the guaranty is executed. Section 2809 of the Calif. Civil Code adopts the common law rule:

"The obligation of a guarantor must be neither larger in amount nor in other respects more burdensome than that of the principal; and if in its terms it exceeds it, it is reducible in proportion to the principal obligation."

D. EXPRESS PROVISION FOR TERMINATION IN LIGGETT LEASE IS STRONGER THAN LEASE PROVISION INVOLVED IN CASE OF MURRAY REALTY CO. v. REGAL SHOE CO.

In the court below appellant's counsel relied upon the case of *Murray Realty Co. v. Regal Shoe Co.*, 270 N. Y. S. 737 (Appellate Division) and argued that it presented "a real analogy to the case at bar" to use the words of counsel. The *Murray* case has, since the argument in the court below, been reversed by the New York Court of Appeals by a divided court. The decision appears at 193 N. E. 164.

The *Murray* case was an action for rent for certain months prior to the disaffirmance of the lease by the lessee's receiver and trustee in bankruptcy. The lease involved therein contained these two clauses:

"That an adjudication that the lessee is bankrupt shall ipso facto end and terminate this lease and any rights thereunder."

"The lessor, at its option, may rescind and terminate this agreement upon * * * the breach of any of its conditions or any of the covenants or agreements of said lessee."

The Trial Term (trial court) construed the first of the above clauses as a conditional limitation and dismissed the complaint. The Appellate Division re-

versed the judgment of the Trial Term and gave judgment for the plaintiff on the grounds (1) that the termination by bankruptcy was embodied in covenants by the lessee and therefore should be construed as such, and (2) that since voluntary bankruptcy was not mentioned in the clause, the clause should be limited to *involuntary* bankruptcy.

As we pointed out in the court below, we were not obliged to defend the holding of the dissenting judge in the decision by the Appellate Division. We needed only to point out that in the Liggett lease the paragraph in which the clause under consideration appears does not contain covenants by the lessee. The clause follows covenants by the lessors.

Moreover, the Appellate Division in the *Murray Realty Co.* case explained their decision as follows:

> "The words 'ipso facto' ('by the fact itself', 'in and of itself') should be read in conjunction with the rest of the lease. They are a part of a covenant by the lessee only. The paragraph containing them does not specify *voluntary* bankruptcy * * *" (Italicized by the court.)

The reversal by the Court of Appeals of this decision of the Appellate Division which was so heavily relied upon by the appellant in the court below is very damaging to the appellant's contentions. The majority decision by the New York Court of Appeals is very convincing support for appellee's contentions herein. The decision of the highest New York court was that although the lease contained a clause which *did not specify* lessee's *voluntary* bankruptcy as condition for

termination, nevertheless, it was to be determined strictly by the language of the lease. Such a decision is obvious support for appellee's contentions that a lease which *does* contain a provision for termination on *voluntary* bankruptcy must be terminated in accordance with its more explicit terms.

After referring to Judge L. Hand's statement in the *Matter of Outfitters' Operating Realty Co., Inc.*, 69 F. (2d) 90 at 91 (C. C. A., 2nd), affirmed in 293 U. S. 307, and to the language of *Schneider v. Springmann,* infra, the New York Court of Appeals concluded at page 165 of 193 N. E.:

> "Cogent as such reasoning may be, bankruptcy of the tenant may be made a special limitation upon the term of a lease. The question must be determined by the language of the lease. As Lehman, J., said in *Janes v. Paddell,* 67 Misc. 420, 422, 122 N. Y. S. 760, 761: 'It cannot be disputed that *the parties have a right to provide either that the lease shall terminate at the happening of an event or that the event shall give the landlord the option of terminating it.* The intent of the parties can be determined only from the language of the lease.'
>
> It is easy for the draughtsman of a lease to provide that an adjudication in voluntary bankruptcy shall terminate the lease only if the landlord shall so elect. That is not the language of the lease before us. By a process of judicial construction plain words—'ipso facto end and terminate'—are made to read as if they were a lessor's covenant merely. We are constrained to accept the construction of the trial justice and say that the clause under consideration is a conditional

limitation by reason of which the lease expired upon an adjudication that the lessee is bankrupt. Bankruptcy constitutes a breach of the lease. It thereupon ends and terminates, ipso facto."

E. APPELLANT'S AUTHORITIES DISTINGUISHED.

Appellant's authorities are easily distinguishable. Only three cases upon which appellant places reliance are at all similar on their facts to the case at bar.

(1) *In re Roth and Appel*, 181 Fed. 667 (C. C. A., 2nd). The holding in this case can only be understood by quoting the entire lease clause involved in the case and not merely that portion thereof quoted by counsel. (Appellant's Brief p. 26.) The entire clause (appearing at 181 Fed. 668) reads as follows:

> " 'In case the lessee is declared bankrupt, the lease shall terminate and the lessor has a right to re-enter, in which case the lessee agrees, as a part consideration hereof, that it, and its legal representatives, will pay to the lessor and his legal representatives on the first day of each month, as upon rent days, the difference between the rents and sums reserved and agreed to be paid by the lessee and those otherwise reserved or with due diligence collectible, on account of rents of the demised premises for the preceding month, up to the end of the term remaining at the time of the entry. Such re-entry shall not prejudice the right of the lessor to recover for rent accrued or due at the time of such re-entry.' "

The sole question before the court was whether the following obligation was provable as a claim in bankruptcy, to wit:

> "'* * * in which case the lessee agrees, as a part consideration hereof, that it, and its legal representatives, will pay to the lessor and his legal representatives on the first day of each month, as upon rent days, the difference between the rents and sums reserved and agreed to be paid by the lessee and those otherwise reserved or with due diligence collectible, on account of rents of the demised premises for the preceding month, up to the end of the term remaining at the time of the entry. * * *'"

The question was not whether the termination of the lease was optional with the lessor, since not only had the petition in bankruptcy been filed prior to the beginning of the term, but the lessor had relet the premises before adjudication. In addition thereto, the clause was not nearly as strong as the one now before the court. It did not state that the lease in the event of bankruptcy should *immediately* terminate. Furthermore, it contained the following language (appearing at 181 Fed. 668) which clearly showed that the rent was to continue until actual re-entry, under which circumstances the parties could not well have intended the lease to terminate prior thereto, to wit:

> "Such re-entry shall not prejudice the right of the lessor to recover for rent accrued or due at the time of such re-entry."

The court furthermore recognizes that parties may contract for a termination which shall *not* be op-

tional. We quote from page 671 of the opinion as follows:

> "Undoubtedly the parties to a lease may agree that bankruptcy shall terminate it, and that, upon such termination, all future installments of rent shall at once become due and payable * * *"

(2) *Schneider v. Springmann*, 25 Fed. (2d) 255 (C. C. A. 6th). This case is an authority in favor of the appellee. In the lease involved in the *Schneider* case the word "forfeiture" was used and the question before the court was whether "forfeiture" meant "terminated" or meant "terminable at the option of the lessor". The court held that it meant the latter. The court at least impliedly and probably expressly conceded that if the clause under discussion meant that the lease should "terminate" the holding would have been the other way.

The Liggett lease states that in the event of bankruptcy "this lease shall immediately *terminate*". We quote from the language of the *Schneider* case (appearing at p. 256):

> "The other *controlling* reason is that 'forfeited' and 'terminated' are not synonymous; it would have been easy to say 'terminated'. A thing is hardly 'forfeited' unless it has previously been 'forfeitable' or 'forfeit'. These words strongly imply an election by the person who is to take the thing forfeited. The Century Dictionary definition of the verb used in the applicable form is that the owner by his own act has 'become liable to be deprived of' the article."

(3) *Sixty-Eight Beacon Street, Inc. v. Sohier* (Mass., 1935), 194 N. E. 303. No question of termina-

tion upon lessee's bankruptcy is involved. This decision of the Massachusetts court is furthermore readily distinguishable from the case at bar for two reasons:

1. It turned on a breach of the lease covenant by the lessee that lessee would not assign the lease except under certain conditions. The case at bar involves *no lease covenant* by the lessee *that lessee will not be adjudicated a bankrupt* and therefore no breach can be established.

2. The Sohier lease contained in a separate paragraph other than that quoted by appellant, a covenant by the lessee that in the event of violation by the lessee of any restriction or condition imposed in the lease that the lease might *at the option of the lessor be terminated* in the manner therein provided, whereas in the case at bar one paragraph of the Liggett lease contains the complete and only clauses for termination (a) immediately upon bankruptcy, and (b) upon the exercise of lessor's option upon insolvency, receivership, etc.

An examination of the transcript of record (p. 8) in the above mentioned case (of which this court may take judicial notice) contains a copy of the original lease showing the following lease provisions were involved:

> "The lessee doth hereby covenant and agree to and with the lessor as follows:
>
> Fifth: * * *
>
> Sixth: * * *
>
> Seventh: * * * It is hereby expressly understood and agreed that the character of the oc-

cupancy of the demised premises, as above expressed, is an especial consideration and inducement for the granting of this lease by the Lessor to the Lessee, and in the event of a violation by the Lessee of the restriction against subletting or assignment, or if the Lessee shall cease to occupy the premises without notice to the Lessor, or permit the same to be occupied by parties other than as aforesaid, or *violate any other restriction or condition herein imposed, this lease may, at the option of the Lessor,* through its Board of Directors, *be terminated* in the manner herein provided.

Eighth: * * *

Ninth: That the within lease shall cease, determine and become null and void upon the happening of either or all of the following contingencies:

(a) In case at any time during the term of this lease the Lessee shall attempt to sell, pledge or dispose of said shares of capital stock or any part thereof or this lease otherwise than in accordance with the provisions of the agreement of association, which said provision is stamped upon the certificate of said stock and is hereby made a part of this lease and reads as follows:

> This stock is continuously pledged to the company for the payment of any obligation to the company of the holder of said stock or of any occupant or lessee under said stockholder's proprietary lease and will not be transferred except upon such payment.

No sale or transfer, or pledge, of said stock and no assignment of said proprietary lease shall be made without the written consent of the Board

of Directors of the Company, except as hereinafter provided in case of the death of such stockholder and lessee, * * *

(b) In case at any time hereafter the Lessor shall determine, with the written consent of the holders of eighty-seven and one-half (87½) per cent, in amount of its outstanding capital stock, to sell the property of the Lessor in which the apartment hereby leased shall be, then and in such event this lease and all right and estate of the Lessee thereunder shall at the option of the Lessor terminate after the receipt of thirty (30) days' notice of the Lessor's determination aforesaid to sell and of the aforesaid consent of eighty-seven and one-half (87½) per cent, of the stockholders thereto, and upon or prior to the expiration of thirty (30) days after receipt of such notice the Lessee shall quit and surrender up possession of said premises and this lease shall thereupon cease and determine."

It is to be noted that this case involved a lease provision clearly set forth as a lessee's covenant and the court had only to hold that the express terms of paragraph seventh granting an option to lessor to terminate the lease upon the breach by lessee of any covenant were repugnant to the provisions of paragraph ninth and therefore permitted a construction of the provisions of paragraph ninth which would not be permitted were it not for such repugnancy.

The balance of appellant's authorities are foreign upon their facts. We do not dispute their correctness. These authorities lay down general principles

having to do with circumstances to be taken into consideration in the construction of lease or contract provisions. They hold that a lease or contract provision that it shall become null and void upon *default* by lessee in paying rent or upon some other similar *breach* by a party thereto is to be construed to prevent *forfeiture* by implying a grant of an option to lessor or to the other party to the contract. Such authorities have no application to the situation involved herein, namely, that of clear language showing precise intention of the parties to the lease to terminate on an event not stated to be a breach. Such intention must be given effect irrespective of what motive the parties may have had.

F. APPELLANT'S ARGUMENTS DISCUSSED.

Appellant's arguments appear as follows which we shall answer as we separately consider them.

(1) "The general principles relating to the interpretation of instruments support appellant's decision."

Appellee does not dispute the general principles relating to the interpretation of instruments as those principles are set forth in appellant's brief, pages 9 to 11 inclusive, but appellee desires to call the court's attention to the most familiar rule of interpretation which appellee has ignored, namely, the rule expressed in Calif. Civil Code Section 1638:

> "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

Could the lease provision involved herein be more clear and explicit? Can it arbitrarily be assumed to be absurd?

(2) **"Courts hold that a mere election to terminate a lease exists, notwithstanding that one particular clause isolated from the rest of the lease, specifically provides for an automatic termination."**

Appellant's arguments contained on pages 11 to 16 inclusive concerning the insertion by inference of an election to terminate is not applicable to the lease provision in the case at bar. It is to be noted that all of the cases cited by appellant relate to the insertion of an election to terminate in a contract or lease which provides for an automatic termination thereof upon default or forfeiture. The lease provision under discussion contains no provision for termination upon the happening of a default or breach and therefore it cannot be said that a forfeiture is involved.

A further answer to appellant's argument based on forfeiture is to be found at page 763 in the report of *Devonshire v. Langstaff*, supra, where the court said:

> "Neither are we concerned with the element of forfeiture. *If the provision for the termination of the lease is a lawful subject of contract undoubtedly it was embodied in the present lease for the benefit of the lessors; if forfeiture is in any way involved it is the forfeiture of the leasehold interest of the tenant.* But here the tenant, the party against whom the forfeiture would operate, has raised no issue of forfeiture and is not claiming any rights under the principles of

law or equity applicable to forfeiture. Lessors, therefore, being beneficiaries under the terms of the lease as to forfeiture, assuming it is found, cannot be heard to complain or raise the issue, it affecting only the rights of the lessees."

(3) "**Bankruptcy of a lessee and especially voluntary bankruptcy is a default.**"

Appellee does not dispute the argument that bankruptcy of a lessee may be a default *if* the lease so provides. Appellant's assumption that voluntary bankruptcy of the lessee in the Liggett lease is a default is but to glibly assume the point at issue. Appellee challenges appellant to point out any provision in the Liggett lease under the terms of which lessee covenants to refrain from becoming a bankrupt.

Appellant very illogically argues that since a person may capriciously file a voluntary petition in bankruptcy that the filing thereof must constitute a default under a lease despite the terms of the lease itself. Although it is true that the filing of a voluntary petition in bankruptcy is within the power of the lessee it is not a power that one would contemplate being exercised without need or necessity therefor. Its exercise meant the liquidation of the lessee. It was hardly a right or power that as a practical matter would be used at the whim or caprice of the lessee.

As a matter of fact, it is well established that a lessee's bankruptcy is *never* a breach of or default under any lease unless there is a provision to that effect therein. The effect of lessee's bankruptcy on a lease which contains no clause such as is involved

herein, is that until a lease is disaffirmed by the trustee the trustee is bound thereunder and upon his disaffirmance such lease still remains a liability of the bankrupt. Appellant's argument that lessee's adjudication in bankruptcy constitutes a breach of the lease despite its terms is a misstatement of the law.

> *Manhattan Properties, Inc. v. Irving Trust Company, etc.*, 291 U. S. 320;
> *In re Roth and Appel,* supra.

(4) "Viewing the lease as a whole it is apparent that the parties intended a condition subsequent."

Appellant's arguments (pp. 20 and 21) relating to a construction of the instrument by resort to a view of the lease as a whole again loses sight of the fundamental principle that a lease must be given the effect which was obviously intended. If a particular clause as in the case at bar is introduced by the words "In the event, however," the phrase thus introduced must override any repugnant clauses, if any, contained in other parts of the lease. Appellant argues that the provision of the lease "Lessee further covenants and agrees that during all of the lease term created it will maintain its business on the demised premises", has some significance. This is typical of appellant's fallacious reasoning inasmuch as it is obvious that the real issue of this case is: *What event limited the term?*

The parties to this lease expressed their undertakings in clear and concise language to the effect that upon adjudication in bankruptcy, whether through voluntary or involuntary proceedings, the lease should *immediately* terminate. We are at a loss to conceive

of stronger language which could have been used in lieu thereof if the above mentioned result has not been obtained by the language actually employed. The use of such concise and clear language forbids the resort to other clauses of the lease despite any seeming repugnance. Appellee denies that there is any such repugnancy in the Liggett lease.

(5) "**The coincidentally executed guaranty irrefutably condemns the construction sought by appellee.**"

In appellant's effort to write into the words of the Liggett lease an option in the lessor which was obviously intentionally omitted, appellant resorts to the argument that its guaranty was worthless if bankruptcy terminated the lease. There were a number of circumstances under the express terms of the lease which could well account for the execution of the guaranty and give it value:

1. Lessee's failure or refusal to pay rent;

2. Lessee's failure or refusal to perform other covenants;

3. Lessee's receivership;

4. Lessee's assignment for benefit of creditors; and

5. Lessee's insolvency short of bankruptcy.

If we are obliged (though we believe we are not) to account for the *expressed* intention of the parties that the lease should absolutely terminate in the event of bankruptcy and, thereby, to account for their intention as to the scope of the guaranty (which can be no

greater than coextensive with the lease, supra, bottom p. 12), we suggest the following:

This lease was executed in February of 1926 at a time when the effect of bankruptcy upon leases was by no means as clear as it is at the present date.

Manhattan Properties, Inc. v. Irving Trust Co., supra;

2 *Remington on Bankruptcy* (3rd ed.) sec. 789, p. 181.

The lessors may have considered, and the language of one of the clauses under discussion is support therefor, that they did not desire to encounter any complications growing out of proceedings in bankruptcy. It expressly provides that in no event shall the lease be treated as an asset of the lessee after adjudication in bankruptcy.

If the provision as to termination in the event of bankruptcy had been made optional it would have been incumbent upon the lessors to have exercised that option against the lessee's trustee in bankruptcy thereby requiring it to enter into the bankruptcy proceedings. The effect of bankruptcy on leases being none too clear was reason enough to avoid it. The fact that the guarantor itself might become bankrupt may have been an additional reason for avoiding the possibility of the lease going into the hands of a bankruptcy trustee. This they did by express provision. The foregoing may or may not have been the case. We are not obliged to read their thoughts. The parties expressly stated that upon lessee's adjudication of bankruptcy

the lease should immediately terminate and should be no longer considered as an asset of the lessee. How could they have been more emphatic?

We again call to the court's attention that resort to other matters within an instrument itself is not permissible to construe contrary to its own terms unambiguous language contained therein. Appellant's counsel here go farther afield in resorting to matters in a contract between parties other than parties to the lease to construe plain and unambiguous language in the lease to mean other than it expressly states.

(6) **"The specific authorities dealing with the bankruptcy of the lessee definitely support appellant's position."**

This subdivision of appellant's argument relates entirely to discussion of the cases of *Schneider v. Springmann,* supra, *In re Roth and Appel,* supra, and appellant's attempt to distinguish the case of *Jandrew v. Bouche,* supra, from the case at bar which matters were discussed on pages 11, 12, 16, 17 and 18, supra.

III.

CONCLUSION.

A careful analysis of appellant's arguments shows that appellant argues as follows:

(1) Because the parties could not have intended the lease to terminate upon bankruptcy the language of the lease is ambiguous and therefore it must be construed contrary to its own express terms.

(2) Because lessee's act in filing a petition to be adjudicated a voluntary bankrupt is a breach of or default under the lease (which states that upon the happening of just such an act the lease is terminated) the lease must be construed contrary to its own express terms.

(3) Unambiguous language of the lease must be construed in the light of the effect it might have upon the obligations of *a third party* created by a guaranty executed contemporaneously with the lease.

The foregoing analysis of the arguments made by appellant is in itself sufficient answer to the arguments made. However, we cannot too forcefully emphasize the fallacy that underlies appellant's entire argument, namely, that clear and unambiguous language is open to construction. Counsel has seized upon the elements above noted to create an ambiguity where none exists and then by the same means resolved such nonexistent ambiguity in their own favor. Parties have a right to contract that an act within the control of one of the parties shall terminate their obligation; parties have a right to contract that an act which may constitute a default upon the part of one of the parties shall terminate the obligation; parties have a right to contract that even though a forfeiture is involved the obligation shall terminate; and parties have a right to contract that the termination of their obligation shall, under certain circumstances, be optional and shall, under other circumstances, be abso-

lute. Appellee submits that in the case at bar the parties to the Liggett lease contracted that under the circumstance of bankruptcy adjudication of lessee, the termination of the obligation was absolute.

Dated, San Francisco,
February 3, 1936.

Respectfully submitted,
Donald Y. Lamont,
Paul L. May,
Chickering & Gregory,
Attorneys for Appellee.

No. 7771

United States
Circuit Court of Appeals
For the Ninth Circuit.

NORTHERN PACIFIC TERMINAL COMPANY OF OREGON, a Corporation,

Appellant.

vs.

SPOKANE, PORTLAND and SEATTLE RAILWAY COMPANY, a Corporation,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the District of Oregon.

FEDERAL PRINTING AND COMPOSITION COMPANY, SAN FRANCISCO, CALIFORNIA

No. 7771

United States Circuit Court of Appeals

For the Ninth Circuit.

NORTHERN PACIFIC TERMINAL COMPANY OF OREGON, a Corporation,

Appellant.

vs.

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Transcript of Record

Upon Appeal from the United States District Court for the District of Oregon.

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NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD.

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Platt Building,
Portland, Oregon,
For the Appellant.

CAREY, HART, SPENCER & McCULLOCH,
Yeon Building,
Portland, Oregon,
For the Appellee.

In the District Court of the United States for the District of Oregon

July Term, 1933.

BE IT REMEMBERED, That on the 20th day of September 1933, there was duly filed in the District Court of the United States for the District of Oregon, a COMPLAINT, in words and figures as follows, to wit: [4]*

In the District Court of the United States for the District of Oregon

No. L-12110

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

Plaintiff

v.

NORTHERN PACIFIC TERMINAL COMPANY, a corporation,

Defendant.

COMPLAINT

Now comes plaintiff and for cause of action herein alleges:

I.

Plaintiff is a corporation organized and existing under the laws of the State of Washington. Defendant is a corporation organized and existing under the laws of the State of Oregon.

* Page numbering appearing at the foot of page of original certified Transcript of Record.

II.

The jurisdiction of this court as a federal court herein is based upon diversity of citizenship. The amount involved, exclusive of interest and costs, exceeds the sum of $3,000.00.

III.

Plaintiff is a common carrier operating a railroad between Spokane, Washington, and Portland, Oregon, and elsewhere, subject to the provisions of an Act to Regulate Commerce, approved February 4, 1887, as amended, being the Interstate Commerce Act, United States Code, Title 49, [5] Chapter 1. Defendant is engaged as a common carrier in the operation of a terminal railroad within the City of Portland, Oregon, and its operations are also subject to said statute.

IV.

Between April 1, 1929, and January 4, 1930, plaintiff received and accepted from defendant as consignor, at plaintiff's station of Willbridge in the City of Portland, Oregon, 286 carload shipments of fuel oil for transportation to Guilds Lake Yard, also within the City of Portland. All of said carload shipments of fuel oil were duly transported by plaintiff to Guilds Lake Yard in accordance with bills of lading issued to cover said shipments, and at Guilds Lake Yard were delivered to defendant.

V.

Theretofore plaintiff had filed with the Interstate Commerce Commission and with the Public

Service Commission of Oregon and had published tariffs which stated a rate of $8.55 per car for the transportation of fuel oil from Willbridge to Guilds Lake Yard, and during the entire period of said shipments the duly and regularly filed and published charge for such transportation under the Interstate Commerce Act as amended, and under the statutes of the State of Oregon, was $8.55 per car; and the total transportation charge for said 286 cars of fuel oil was and is the sum of $2,445.30.

VI.

Between the 8th day of January, 1930, and the 4th day of January, 1932, plaintiff received and accepted from defendant as consignor, at plaintiff's station of Linnton [6] in the City of Portland, Oregon, 664 carload shipments of fuel oil for transportation to Guilds Lake Yard, also within the City of Portland. All of said carload shipments of fuel oil were duly transported by plaintiff to Guilds Lake Yard in accordance with bills of lading issued to cover said shipments, and at Guilds Lake Yard were delivered to defendant.

VII.

Theretofore plaintiff had filed with the Interstate Commerce Commission and with the Public Service Commission of Oregon and had published tariffs which stated a rate of $8.54 per car for the transportation of fuel oil from Linnton to Guilds Lake Yard, and during the entire period of said shipments the duly and regularly filed and pub-

lished charge for such transportation under the Interstate Commerce Act as amended, and under the statutes of the State of Oregon, was $8.54 per car; and the total transportation charge for said 664 cars of fuel oil was and is the sum of $5,670.56.

VIII.

Between the 2nd day of January, 1932 and the 28th day of March, 1932, plaintiff received and accepted from defendant as consignor, at plaintiff's station of Linnton in the City of Portland, Oregon, 87 carload shipments of fuel oil for transportation to Guilds Lake Yard, also within the City of Portland. All of said carload shipments of fuel oil were duly transported by plaintiff to Guilds Lake Yard in accordance with bills of lading issued to cover said shipments, and at Guilds Lake Yard were delivered to defendant, [7]

IX.

Theretofore plaintiff had filed with the Interstate Commerce Commission and with the Public Service Commission of Oregon and had published tariffs which stated a rate of $9.40 per car for the transportation of fuel oil from Linnton to Guilds Lake Yard, and during the entire period of said shipments the duly and regularly filed and published charge for such transportation under the Interstate Commerce Act as amended, and under the statutes of the State of Oregon, was $9.40 per car; and the total transportation charge for said 87 cars of fuel oil was and is the sum of $817.80.

X.

The total charges which accrued and became due to plaintiff from defendant for said transportation of fuel oil from Willbridge to Guilds Lake Yard and from Linnton to Guilds Lake Yard, was and is the sum of $8,933.66.

XI.

Through error and in the mistaken belief that defendant was a participating carrier in the transportation of said shipments of fuel oil under the applicable tariffs, plaintiff heretofore allowed and paid to defendant as a division under said tariffs, one-half of the amount due and collectible for said transportation. Defendant was not a participating carrier and is not entitled under the applicable tariffs to a share in or a division of the tariff charge covering said transportation service; and because of said mistaken allowance and payment plaintiff has not charged or collected from defendant the full amount specified by said applicable tariffs for the transportation service rendered, [8] and by reason thereof defendant is indebted to plaintiff in the amount of the allowance and payment so mistakenly made, being the total sum of $4,466.83.

WHEREFORE, Plaintiff demands judgment against defendant for the sum of $4,466.83, and for its costs and disbursements herein.

CAREY, HART, SPENCER & McCULLOCH
Attorneys for Plaintiff

State of Oregon
County of Multnomah—ss.

I, A. J. WITCHEL, being first duly sworn, depose and say: That I am Secretary of SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, the plaintiff in the above entitled cause; that I have read the foregoing complaint and know the contents thereof, and the same is true as I verily believe.

A. J. WITCHEL

Subscribed and sworn to before me this 19th day of September, 1933.

[Notarial Seal] J. R. OSBORN
Notary Public for Oregon
My Commission expires: March 24, 1936.

[Endorsed]: Filed September 20, 1933. [9]

AND AFTERWARDS, to wit, on the 30th day of September, 1933, there was duly FILED in said Court, an ANSWER, in words and figures as follows, to wit: [10]

[Title of Court and Cause.]

ANSWER

Comes now the defendant and for answer to plaintiff's complaint, admits, denies and alleges as follows:

I.

Admits Paragraph I, except that defendant alleges that the corporate name of the defendant is

The Northern Pacific Terminal Company of Oregon.

II.

Admits Paragraph II.

III.

Admits Paragraph III.

IV.

Defendant denies each and every allegation and the whole of Paragraph IV of plaintiff's complaint, except that defendant admits that from April 1, 1929, to January 4, 1930, the Standard Oil Company of California, as consignor, delivered to plaintiff at its station at Willbridge, in the City of Portland, 286 carload shipments of fuel oil for transportation and delivery to the fuel oil spur of the defendant at defend- [11] ant's Guilds Lake Terminal, also within the City of Portland, and that said shipments of fuel oil were transported from Willbridge Station by the plaintiff and delivered to the defendant on the transfer track for interchange of business between the plaintiff and the defendant in Guilds Lake Yard for further transportation by the defendant to the fuel oil spur of the defendant in Guilds Lake Terminal, and were so transported. That at all times the said fuel oil was the property of the Standard Oil Company of California and did not become the property of the defendant until delivery at its fuel oil spur in Guilds Lake Terminal. Except as so admitted defendant denies each

and every allegation in said Paragraph IV of plaintiff's complaint.

V.

Defendant admits each and every allegation and the whole of Paragraph V of plaintiff's complaint, except that defendant alleges that the said rate of $8.55 per car applied on transportation of fuel oil from Willbridge to all tracks in Guilds Lake terminal, including the fuel oil spur at the roundhouse in Guilds Lake terminal and that the total charges assessable for such transportation of said cars was $2445.30 for the transportation thereof from point of receipt by the plaintiff at Willbridge to point of delivery at the fuel oil spur in the Guilds Lake terminal of the defendant.

VI.

Defendant denies each and every allegation and the whole of said Paragraph VI of plaintiff's complaint, but admits that between January 8, 1930, and the 4th day of January, 1932, the Richfield Oil Company of California, as consignor, delivered to the plaintiff at plaintiff's station in Linnton, in the City [12] of Portland, 656 carload shipments of fuel oil for transportation and delivery at the fuel oil spur of the defendant in Guilds Lake terminal, also within the limits of the City of Portland, and except further that the defendant admits that the carload shipments of fuel oil were transported by the plaintiff to the transfer track designated for the transfer of carload shipments between the plain-

tiff and the defendan*d* in Guilds Lake yard for further transportation by the defendant from said transfer track to point of final delivery at the oil spur in Guilds Lake terminal of defendant. Except as so admitted defendant denies each and every allegation of Paragraph VI of said complaint.

VII.

Defendant admits each and every allegation and the whole of Paragraph VII of plaintiff's complaint, except that defendant alleges that the said rate was $8.55 per car and that the said rate applied on shipments of fuel oil in carload lots from the station of Linnton to all tracks within the Guilds Lake terminal of the defendant, including the fuel oil spur at the roundhouse of defendant in said Guilds Lake terminal, and except further that *plaintiff* denies that said total shipments were 664 cars or that the total transportation charge therefor was $5670.50, but admits that the total carload shipments were 656 cars, and that the total transportation charges due for said transportation from Linnton to the fuel oil spur at the roundhouse of defendant in the Guilds Lake terminal was the sum of $5608.80. [13]

VIII.

Defendant denies each and every allegation and the whole of Paragraph VIII of plaintiff's complaint, except that defendant admits that between the 2nd day of January, 1932 and the 28th day of March, 1932 the Richfield Oil Company of Cali-

fornia, as consignor, delivered to the plaintiff for transportation from plaintiff's station at Linnton, in the City of Portland, Oregon, 88 carload shipments of fuel oil for transportation to the fuel oil spur of the defendant at the roundhouse in Guilds Lake terminal, also within the City of Portland, and that the said shipments were delivered to the defendant at the transfer track designated for transfer shipments between the plaintiff and defendant at Guilds Lake Yard for further transportation from said transfer track to point of final delivery at the said fuel oil spur and that said shipments were so transported over the lines of the plaintiff and the defendant from Linnton to the said fuel oil spur. Except as so admitted, defendant denies each and every allegation in Paragraph VIII of plaintiff's complaint.

IX.

Defendant admits each and every allegation of Paragraph IX of plaintiff's complaint, except that defendant denies that there were only 87 cars of fuel oil, or that the total transportation charge was only $817.86, but admits that there were 88 cars of fuel oil and that the total transportation charge from Linnton to the said fuel oil spur was $827.20, and except further the plaintiff alleges that the said rate of $9.40 applied from Linnton to deliveries on all tracks within the [14] Guilds Lake terminal, including the said fuel oil spur at the roundhouse in said terminal for which said fuel oil was destined.

X.

Defendant denies each and every allegation and the whole of Paragraph X of plaintiff's complaint, but admits that the total charges on all such shipments from Willbridge to the fuel oil spur in Guilds Lake terminal, and from Linnton to the said fuel oil spur in the Guilds Lake terminal during said period was and is the sum of $8881.30.

XI.

Defendant denies each and every allegation and the whole of Paragraph XI of plaintiff's complaint.

For a FIRST further and separate answer and defense to plaintiff's complaint, defendant alleges:

I.

That the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Washington, and is engaged in the transportation of freight and passengers both in interstate and intrastate commerce and has filed tariffs covering transportation of such freight and passengers both with the Interstate Commerce Commission and with the Public Utilities Commissioner of the State of Oregon, and its predecessor, Public Service Commission of Oregon, establishing such rates and charges, and is subject both to the Act of Congress known as the Interstate Commerce law and the Public Service Laws of the State of Oregon. [15]

II.

Defendant is a corporation organized and existing under and by virtue of the laws of the State of Oregon, and is engaged in the transportation of freight and passengers over its line and has filed with the Interstate Commerce Commission and with the Public Utilities Commissioner of the State of Oregon, and his predecessor the Public Service Commission of Oregon, tariffs stating such charges and is subject to both the Act of Congress known as the Interstate Commerce law and the laws of the State of Oregon governing public service corporations.

III.

That heretofore and prior to the 1st day of February, 1923, the plaintiff and defendant in conjunction with the Northern Pacific Railway Company, the Oregon Electric Railway Company, Oregon-Washington Railroad & Navigation Company, Portland Electric Power Company, Southern Pacific Company, and United Railways Company established and filed tariffs with the Interstate Commerce Commission and the Public Service Commission of Oregon stating rates for what was known as zone switching between all points on the lines of said companies within the switching limits of the City of Portland, Oregon, and thereafter at all times since has had in force and had schedules on file with both the Interstate Commerce Commission and the Public Service Commission of Oregon, and its successor the Public Utilities Commissioner

of the State of Oregon governing the charges to be applied on shipments between points on any of said lines and points on other of such lines. That in and by said tariffs so filed and in force it was provided that rates named in said [16] tariffs should apply only for intra terminal, inter terminal and intra plant service, and must not be used when the switching is performed in connection with the line haul. That in said tariffs inter terminal switching was defined as a switching movement from a track on one road to a track of another road when both tracks are within the switching limits of the same station or industrial switching district. That in and by said tariffs it was provided that zone 5 should embrace all tracks on the west side of the Willamette River north of Nicolai Street to the northern boundary of Linnton. That the rate established and in effect by said tariffs at all times from and after February 1, 1923, up to and including the date of the last shipment referred to in plaintiff's complaint should be from one point within zone 5 to another point within zone 5, the sum of $8.55 per car, except that from and after January 4, 1932 up until the present time the rate per car for such switching from one point in Zone 5 to another point in zone 5 is $9.40 per car. That during a part of said time an increased rate was in effect for cars over 42 feet in length, but defendant alleges that all of said cars involved in the present controversy were under 42 feet in length, and that the said increased rate for extra length cars had

no application to any of the shipments involved in this controversy.

IV.

Defendant alleges that the tracks on the line of the plaintiff at both Li*nt*on and Willbridge, at which any of the shipments involved in this controversy originated, were within zone 5, as defined by said tariffs on file, and [17] that all tracks, including both the transfer track at Guilds Lake yard and the fuel oil spur at the roundhouse in the Guilds Lake terminal herein referred to were in Zone 5 as defined by said tariffs on file, and that the entire haul of said shipments from their originating point either at Linnton or Willbridge, through the transfer track at Guilds Lake yard to the point of final destination at the fuel oil spur at the roundhouse in the Guilds Lake terminal was within zone 5 as defined by said tariffs. That on none of said shipments was any line haul involved.

That by agreement of the parties establishing the division of rates for any such haul it was provided that when only two lines participated in the haul the charge for such haul should be divided equally between the carriers participating in the haul.

That the plaintiff has no interest in or any right to operate over or make deliveries of shipments to any point in the Guilds Lake terminal, and that all deliveries of shipments to points in the Guilds Lake terminal are made by the defendant, except that commencing on September 12, 1922, the plaintiff and defendant agreed that on all shipments moved

jointly from Linnton and Willbridge over the lines of the plaintiff and the Terminal Company for further transportation to points on the line of the defendant, the Northern Pacific Railway Company, Southern Pacific Company, or Oregon-Washington Railroad & Navigation Company should be interchanged on the transfer track designated for that purpose in the Guilds Lake yard, and not otherwise, and that later and effective Sunday, January 24, 1926, the plaintiff and defendant agreed that on interchange of all traffic from [18] the plaintiff to defendant for delivery by it or for transfer to the Northern Pacific Railway Company, Southern Pacific Company and Oregon-Washington Railroad & Navigation Company the interchange of all such traffic should be had on the transfer track designated for that purpose in the Guilds Lake yard. Except for the purpose of transfer for further shipment the plaintiff has at no time had the right to come upon any track at the Guilds Lake Yard and has at no time had the right to make final delivery of any shipment in the said Guilds Lake Yard or the Guilds Lake terminal.

That there are no unloading or delivery facilities for oil or any other commodity on the transfer track so designated for transfer of shipments at the Guilds Lake Yard between the plaintiff and the defendant and that none of the shipments so delivered by the plaintiff to the defendant were when placed by the defendant upon the transfer track, at point of final destination, and all of the shipments refer-

red to in plaintiff's complaint and referred to hereinafter in the further and separate answers of the defendant, at final destination of said shipments, but were placed on said track by the plaintiff for transfer to the defendant for further shipment to final destination of such shipments, and not otherwise. That the plaintiff has at all times from and after the 1st day of February, 1923, known that when said shipments were placed on said transfer track by it at the Guilds Lake Yard that said shipments were not at their final destination and were for further transportation by the defendant. That in each and all of the shipments referred to when the same were placed upon the transfer track at Guilds Lake Yard the [19] defendant has received the same for further transportation, and not otherwise, and has transported the same from the said transfer track to the fuel oil spur of the defendant at the roundhouse in the Guilds Lake terminal. That said cars were delivered on said transfer track at all times by the plaintiff, together with numerous other cars, were not spotted by any unloading point by the plaintiff, the defendant was required to break up the transfer cars so set out by the plaintiff, segregate the same, transport the fuel oil cars from said transfer track to the oil spur at the roundhouse of defendant in Guilds Lake terminal, and that the same involved service by the defendant of segregating said cars from other cars and transporting them a distance of from three-quarters to one mile from said transfer point to the point of final destination.

That with reference to all shipments from the Standard Oil Company to the defendant involving all of said shipments up to and including the 4th day of January, 1930, the defendant had no interest in the commodity shipped until the same was delivered on the fuel oil spur in the Guilds Lake terminal as the contract to purchase said oil between the Terminal Company and the Standard Oil Company provided that said shipments be sold to the Terminal Company f. o. b. fuel oil spur in the Guilds Lake terminal. That with reference to the shipment from the Richfield Oil Company the purchase of the oil by the defendant was made f. o. b. the Richfield Oil Company spur at Linnton.

V.

That in each and all of said shipments the defendant was a participating carrier on the shipments from point [20] of origin of said shipments to point of destination to-wit: Oil spur at the roundhouse of the defendant in the Guilds Lake Terminal, and did in fact participate in the transportation service on each and all of said shipments and the defendant was entitled to one-half the revenue accruing on said shipments from point of origin to point of destination.

For a SECOND further and separate answer and defense to plaintiff's complaint, and by way of counterclaim, defendant alleges:

I.

Defendant incorporates herein, refers to and repeats as if set out at large Paragraph I to V, inclusive, of the First further and separate answer and defense to plaintiff's complaint.

II.

That there was shipped over the line of the plaintiff and defendant from either Linnton or Willbridge to the defendant for delivery at the fuel oil spur at the round house in the Guilds Lake terminal from February 1, 1923, to and inclusive of the 6th day of January, 1930, a total of 1,309 cars of fuel oil on which the total charges for transportation was the sum of $19,682.10, of which the defendant has received only $1222.65. That there is due and owing on account of such shipments from the plaintiff to the defendant the sum of $8,618.40. That between the 6th day of January, 1930, and the date of filing this answer, between said points a total of 744 cars was transported, on which the total transportation charges earned was the sum of $6,436.01, on which there was due and owing from the plaintiff to [21] the defendant the sum of $3218.00, no part of which has been paid by the plaintiff to the defendant, except the sum of $3215.91, leaving a balance due the defendant on account of such shipments from the plaintiff of the sum of $2.09.

WHEREFORE, having fully answered plaintiff's complaint defendant prays that plaintiff take

nothing by its complaint, and that the defendant have and recover of and from the plaintiff the sum of $8,620.49, and its costs and disbursements, incurred herein.

JAMES G. WILSON
JOHN F. REILLY
Attorneys for Defendant [22]

State of Oregon
County of Multnomah—ss:

I, E. L. KING, being first duly sworn, depose and say: that I am Vice President of The Northern Pacific Terminal Company of Oregon, defendant within named; that I have read the foregoing Answer, know the facts therein stated, and that the same is true as I verily believe.

E. L. KING

Subscribed and sworn to before me this 30th day of September, 1933.

[Notarial Seal] JAMES G. WILSON
Notary Public for Oregon

My Commission expires: Oct. 5, 1936.

Due service of the within Answer is admitted this 30th day of Sept. 1933.

CAREY, HART, SPENCER & McCULLOCH
Attorneys for Plaintiff

[Endorsed]: Filed September 30, 1933. [23]

AND AFTERWARDS, to wit, on the 21st day of December, 1933, there was duly FILED in said Court, a REPLY, in words and figures as follows, to wit: [24]

[Title of Court and Cause.]

REPLY

Now comes plaintiff and replies to the answer herein as follows:

I.

Plaintiff denies the allegations of paragraph IV of the answer to the effect that the common carrier transportation service undertaken with respect to the shipments of fuel oil therein described and to which the published tariff charge was applicable, extended to the movement of said shipments between the point of delivery to defendant at Guilds Lake terminal and the fuel oil spur, or other place of use, of the defendant upon its property, and denies that said shipments were delivered to defendant for further common carrier transportation under said tariffs.

II.

Plaintiff denies the allegations of paragraph V of the answer to the effect that the published tariff rate covering switching movements of fuel oil from Willbridge to Guilds [25] Lake terminal, extended or applied to the movement of such fuel oil by defendant between the point of delivery by plaintiff at

Guilds Lake and the fuel oil spur, or other place of use, upon defendant's property.

III.

Plaintiff denies the allegations of paragraph VI of the answer to the effect that the common carrier transportation service undertaken with respect to the shipments of fuel oil therein described and to which the published tariff charge was applicable, extended to the movement of said shipments between the point of delivery to defendant at Guilds Lake terminal and the fuel oil spur, or other place of use, of the defendant upon its property, and denies that said shipments were delivered to defendant for further common carrier transportation under said tariffs.

IV.

Plaintiff admits that its complaint was incorrect in the statement of paragraph VI thereof to the effect that 664 carload shipments of fuel oil were received and transported from Linnton to Guilds Lake, and that (as stated in paragraph VII of the complaint) the total tariff charges therefor were the sum of $5,670.56. The correct number of shipments was 657 and the total tariff charges therefor were the sum of $5,617.35.

V.

Plaintiff denies the allegations of paragraphs VI and VII of the answer to the effect that the common carrier transportation service undertaken with

respect to the shipments of fuel oil therein described and to which the published [26] tariff charge was applicable, extended to the movement of said shipments between the point of delivery to defendant at Guilds Lake terminal and the fuel oil spur, or other place of use, of the defendant upon its property, and denies that said shipments were delivered to defendant for further common carrier transportation under said tariffs, and denies that the published tariff rate covering switching movements of fuel oil from Willbridge to Guilds Lake terminal, extended or applied to the movement of such fuel oil by defendant between the point of delivery by plaintiff at Guilds Lake and the fuel oil spur, or other place of use, upon defendant's property.

VI.

Plaintiff denies the allegations of paragraph VIII of the answer to the effect that the common carrier transportation service undertaken with respect to the shipments of fuel oil therein described and to which the published tariff charge was applicable, extended to the movement of said shipments between the point of delivery to defendant at Guilds Lake terminal and the fuel oil spur, or other place of use, of the defendant upon its property, and denies that said shipments were delivered to defendant for further common carrier transportation under said tariffs.

VII.

Plaintiff denies the allegations of paragraph IX of the answer to the effect that the published tariff rate covering switching movements of fuel oil from Willbridge to Guilds Lake terminal, extended or applied to the movement of such fuel oil by defendant between the point of delivery by plain- [27] tiff at Guilds Lake and the fuel oil spur, or other place of use, upon defendant's property.

VIII.

Plaintiff admits the allegations of paragraphs I, II and III of the further and separate answer of defendant.

IX.

Plaintiff admits that the tracks on its line at Linnton and Willbridge are within Zone 5, as defined by the duly published and filed tariffs, but denies that the fuel oil spur, or other place of storage or use for fuel oil on the defendant's property in its Guilds Lake terminal, are points of delivery to which the switching rates stated in said tariffs are applicable.

Plaintiff admits that as to all common carrier transportation service under such tariffs in which two lines participated, the revenue therefor was divided equally pursuant to agreement between the parties.

Plaintiff further admits that it has no interest in, or any right to operate over, tracks within the

terminal of defendant at Guilds Lake, and admits that in making deliveries of shipments for further common carrier transportation to defendant or other carriers, an interchange track in the Guilds Lake yard has been used.

Plaintiff further admits that there are no unloading facilities for oil at the transfer track in the Guilds Lake yard.

Except as so admitted, plaintiff denies each and every allegation of paragraph IV of defendant's further and separate [28] answer.

X.

Plaintiff denies that defendant was a participating common carrier under said applicable tariffs in any of the shipments referred to in paragraph V of the further and separate answer, or in any of the shipments described in the complaint.

XI.

For its reply to defendant's second further and separate answer and counterclaim herein, plaintiff adopts and repeats the allegations of paragraphs VIII to X, inclusive, of this reply relative to defendant's first further and separate answer.

XII.

Further replying plaintiff admits that shipments of fuel oil were made from Linnton or Willbridge to defendant at its Guilds Lake terminal from February 1, 1923, to January 6, 1930, and from January 6, 1930, to the time of the filing of

the answer herein, except that plaintiff denies that such shipments were accepted or received for transportation to the fuel oil spur at defendant's roundhouse, or to any other place of use upon defendant's property. Plaintiff is not advised as to the total shipments so made or as to the total amount of charges assessed therefor under the applicable tariffs, but plaintiff denies that defendant was a participating carrier in the transportation of said shipments, and denies that defendant is entitled to share in the charges assessed and collected for such transportation.

XIII.

Further replying to said second further and separate [29] answer and counterclaim, plaintiff alleges that under the terms of an agreement to which plaintiff and all of the defendant's stockholders are parties, the time limit for making claims for accounting adjustments is 36 months, and that said agreement by custom and practice was adopted and made effective with respect to adjustments of differences with defendant; and plaintiff alleges, with respect to all shipments which were transported and accounted for more than 36 months prior to the date of the filing of defendant's answer, that defendant's counterclaim is barred by lapse of time.

XIV.

Further replying to defendant's second further and separate answer and counterclaim, plaintiff alleges that as to all of the shipments therein de-

scribed which were transported and for which charges were assessed and collected prior to September 30, 1927, that defendant's counterclaim is barred because no action thereon was commenced within the time limited by the laws of the State of Oregon.

WHEREFORE, plaintiff demands judgment as prayed for in its complaint herein.

CAREY, HART, SPENCER & McCULLOCH
Attorneys for Plaintiff [30]

State of Oregon
County of Multnomah—ss.

I, A. J. WITCHEL, being first duly sworn, depose and say: that I am Secretary of SPOKANE PORTLAND AND SEATTLE RAILWAY COMPANY, the plaintiff in the above entitled cause; that I have read the foregoing reply and know the contents thereof, and the same is true as I verily believe.

A. J. WITCHEL

Subscribed and sworn to before me this 26th day of December, 1933.

[Notarial Seal] J. R. OSBORN,
Notary Public for Oregon.

My Commission expires: March 24, 1936.

United States of America,
District of Oregon
County of Multnomah.—ss.

Due service of the Within Reply is hereby accepted at Portland, Oregon, this 20th day of Decem-

ber, 1933, by receiving a copy thereof, duly certified to as such by C. A. Hart, of attorneys for plaintiff.

JAMES G. WILSON,
Attorney for Defendant.

[Endorsed]: Filed December 21, 1933. [31]

AND AFTERWARDS, to wit, on the 14th day of March, 1934, there was duly FILED in said Court, a STIPULATION WAIVING TRIAL BY JURY, in words and figures as follows, to wit: [32]

[Title of Court and Cause.]

STIPULATION FOR WAIVER OF JURY

The parties hereto do hereby waive the right to a jury upon the trial of this action and stipulate that the action may be tried to the court without a jury.

Dated March 14, 1934.

CAREY, HART, SPENCER & McCULLOCH
Attorneys for Plaintiff

WILSON & REILLY
Attorneys for Defendant

[Endorsed]: Filed March 14, 1934. [33]

AND AFTERWARDS, to wit, on the 30th day of October, 1934 there was duly FILED in said

Court, and entered of record, FINDINGS OF FACT AND CONCLUSIONS OF LAW, in words and figures as follows, to wit: [34]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action was duly tried to the court without a jury, the parties having stipulated in writing to waive a jury. The plaintiff was represented by Messrs. Carey, Hart, Spencer & McCulloch and Charles A. Hart, Esquire, and defendant was represented by Messrs. Wilson & Reilly and James G. Wilson, Esquire. The court having heard and considered the evidence and the arguments made for the respective parties, now makes the following

FINDINGS OF FACT

I.

Plaintiff is a corporation organized and existing under the laws of the State of Washington. Defendant is a corporation organized and existing under the laws of the State of Oregon. The amount involved in the cause, exclusive of interest and costs, exceeds the sum of $3,000.00.

II.

Plaintiff is a common carrier operating a railroad [35] between Spokane, Washington, and Portland, Oregon, and elsewhere, subject to the provisions of an Act to Regulate Commerce, approved February 4, 1887, as amended, being the Interstate

Commerce Act, United States Code, Title 49, Chapter 1. Defendant is engaged as a common carrier in the operation of a terminal railroad within the City of Portland, Oregon, and its operations are also subject to said statute.

III.

Between April 1, 1929, and January 4, 1930, there were delivered to plaintiff as a common carrier at Willbridge in the City of Portland, 286 carload shipments of fuel oil consigned to defendant at Guild's Lake, also within the City of Portland. All of said carload shipments of fuel oil were duly transported by plaintiff to Guild's Lake in accordance with bills of lading issued to cover said shipments, and at Guild's Lake were delivered to defendant.

IV.

Theretofore plaintiff and defendant had filed with the Interstate Commerce Commission and with the Public Service Commission of Oregon and had published tariffs which stated a rate of $8.55 per car for the transportation of fuel oil between all points in what was described as Zone 5, in Portland, Oregon. The point of shipment of said oil shipments and all points in Guild's Lake or Guild's Lake district, including the junction of the line of plaintiff and the line of defendant and the oil spur of defendant, were located in said Zone 5. During the entire period of said shipments the duly and regularly filed and published charge for such trans-

portation under the Interstate Commerce Act as amended, and under the statutes of [36] the State of Oregon, was $8.55 per car; and the total transportation charge for said 286 cars of fuel oil was and is the sum of $2,445.30.

V.

Between January 8, 1930, and January 4, 1932, there were delivered to plaintiff as a common carrier, at Linnton in the City of Portland 657 carload shipments of fuel oil consigned to defendant at Guild's Lake, also within the City of Portland. All of said carload shipments of fuel oil were duly transported by plaintiff to Guild's Lake in accordance with bills of lading issued to cover said shipments, and at Guild's Lake were delivered to defendant.

VI.

Theretofore plaintiff and defendant had filed with the Interstate Commerce Commission and with the Public Service Commission of Oregon and had published tariffs which stated a rate of $8.55 per car for the transportation of fuel oil between all points in what was described as Zone 5, in Portland, Oregon. The point of shipment of said oil shipments and all points in Guild's Lake or Guild's Lake district, including the junction of the line of plaintiff and the line of defendant and the oil spur of defendant, were located in said Zone 5. During the entire period of said shipments the duly and regularly filed and published charge for such trans-

portation under the Interstate Commerce Act as amended and under the statutes of the State of Oregon, was $8.55 per car; and the total transportation charge for said 657 cars of fuel oil was and is the sum of $5,617.35.

VII.

Between January 2, 1932, and March 28, 1932, there [37] were delivered to plaintiff as a common carrier, at Linnton in the City of Portland, 87 carload shipments of fuel oil consigned to defendant at Guild's Lake, also within the City of Portland. All of said carload shipments of fuel oil were duly transported by plaintiff to Guild's Lake in accordance with bills of lading issued to cover said shipments, and at Guild's Lake were delivered to defendant.

VIII.

Theretofore plaintiff and defendant had filed with the Interstate Commerce Commission and with the Public Service Commission of Oregon and had published tariffs which stated a rate of $9.40 per car for the transportation of fuel oil between all points in what was described as Zone 5, in Portland, Oregon. The point of shipment of said oil shipments and all points in Guild's Lake or Guild's Lake district, including the junction of the line of plaintiff and the line of defendant and the oil spur of defendant, were located in said Zone 5. During the entire period of said shipments the duly and regularly filed and published charge for such trans-

portation under the Interstate Commerce Act as amended, and under the statutes of the State of Oregon, was $9.40 per car; and the total transportation charge for said 87 cars of fuel oil was and is the sum of $817.80.

IX.

The total charges which accrued and became due to plaintiff from defendant for said transportation of fuel oil from Willbridge to Guild's Lake and from Linnton to Guild's Lake, was and is the sum of $8,880.45.

X.

Through error and in the mistaken belief that de- [38] fendant was a participating carrier in the transportation of said shipments of fuel oil under the applicable tariffs, plaintiff heretofore and on or prior to April 26, 1932, allowed and paid to defendant as a division under said tariffs, one-half of the amount due and collectible for said transportation. Defendant was not a participating carrier and is not entitled under the applicable tariffs to a share in or a division of the tariff charge covering said transportation service; and because of said mistaken allowance and payment plaintiff has not charged or collected from defendant the full amount specified by said applicable tariffs for the transportation service rendered, and by reason thereof defendant is indebted to plaintiff in the amount of the allowance and payment so mistakenly made, being the total sum of $4,440.22.

CONCLUSIONS OF LAW

Plaintiff is entitled to judgment against defendant in the sum of $4,440.22, together with interest at the rate of six per cent (6%) per annum from April 26, 1932, and with costs and its disbursements to be taxed herein.

Dated this 30th day of October, 1934.

JOHN H. McNARY,
District Judge.

United States of America,
District of Oregon
County of Multnomah—ss.

Due service of the within Findings of Fact and Conclusions of Law is hereby accepted at Portland, Oregon, this 27th day of October, 1934, by receiving a copy thereof, duly certified to as such by C. A. Hart, of attorneys for Plaintiff.

JAMES G. WILSON,
Attorney for Defendant.

[Endorsed]: Filed October 30, 1934. [39]

AND AFTERWARDS, to wit, on Tuesday, the 30th day of October, 1934, the same being the 94th JUDICIAL day of the Regular July TERM of said Court; present the HONORABLE JOHN H. McNARY, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [40]

In the District Court of the United States
For the District of Oregon

No. L-12110

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

Plaintiff,

v.

NORTHERN PACIFIC TERMINAL COMPANY, a corporation,

Defendant.

JUDGMENT

The above entitled action having been duly tried, and findings of fact and conclusions of law having been duly made and entered determining that plaintiff is entitled to judgment against defendant in the sum of $4,440.22, with interest at the rate of six per cent (6%) per annum from April 26, 1932;

IT IS ORDERED AND ADJUDGED that plaintiff have and recover from defendant the sum of $4,440.22, together with interest at the rate of six per cent (6%) per annum from April 26, 1932, amounting to the sum of $635.20, and with costs and its disbursements taxed herein in the sum of $26.00.

Dated this 30th day of October, 1934.

JOHN H. McNARY,
District Judge.

[Endorsed]: Filed October 30, 1934. [41]

AND AFTERWARDS, to wit, on Tuesday, the 30th day of October, 1934, the same being the 94th JUDICIAL day of the Regular July TERM of said Court; present the HONORABLE JOHN H. McNARY, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [42]

[Title of Court and Cause.]

ORDER EXTENDING TIME.

This matter coming on on the application of the defendant for allowance of the time within which to present a proposed form of Bill of Exceptions, and it appearing to the Court that the term is about to expire and for said purpose the additional time is necessary,

IT IS HEREBY ORDERED AND ADJUDGED that the defendant have to and including the 30th day of November, 1934, within which to present a proposed Bill of Exceptions, and that the plaintiff may have ten days after the service of said proposed Bill of Exceptions upon it within which to file objections thereto, and that the same shall thereafter be settled,

IT IS FURTHER ADJUDGED AND ORDERED that the present term of this Court be and the same is hereby extended for a period of three months from the date of this order for the completion of all necessary matters to perfect the record in this cause and for the consideration and settlement of all matters relating thereto, includ-

ing the settlement of the Bill of Exceptions and other matters for the perfection of an appeal in said cause, and the Court does hereby retain jurisdiction of said cause and of all matters connected therewith for the purpose of completing the record in said cause.

Done and dated this 30th day of October, 1934.

JOHN H. McNARY,
Judge.

Due service of the within Order Extending Time is admitted this 29th day of Oct. 1934.

C. A. HART,
Attorney for Plaintiff.

[Endorsed]: Filed October 30, 1934. [43]

AND AFTERWARDS, to wit, on the 11th day of December, 1934, there was duly FILED in said Court, a BILL OF EXCEPTIONS, in words and figures as follows, to wit: [44]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

Be It Remembered that on the 14th day of March, 1934, the above entitled cause came on for trial before the Honorable John H. McNary, Judge of said Court, without a jury, a jury having been waived by stipulation of the parties in writing, filed in said cause. The plaintiff appearing by

C. A. Hart, of its attorneys, and the defendant appearing by James G. Wilson, of its attorneys.

Whereupon the following proceedings were had:

R. W. PICKARD,

called as a witness on behalf of the plaintiff, testified:—I am freight agent of the Spokane, Portland and Seattle Railway Company, plaintiff in this case, and have been such for ten years. Prior thereto I was engaged in railroad freight traffic work for about fifteen additional years; said work has involved the study and preparation, and making of rates and publishing of tariffs for line haul switching on railroads. I am familiar with the contracts and agreements under which service is performed by all of the common carrier railroads entering the City of Portland. For that purpose the city is divided into zones and rates prescribed for all within a zone and from zone to zone as shown on what is Exhibit 1, (this exhibit was later [45] introduced in evidence), which shows the different zones in the city. Upon this map the location of Linnton, Willbridge and Guild's Lake are shown—they are all in Zone 5. The Union Depot is in Zone 1. Across the river Albina is in a different zone. The entire east side is divided up into different zones.

The Standard Oil Company's plant at Willbridge is about a mile from Guild's Lake and Linnton is about four miles from Guild's Lake.

ICC No. 276 is the tariff which states the rate

(Testimony of R. W. Pickard.)
from one point to another in Zone 5. This tariff names all of the switching rates within the zones and between zones, which are defined in the tariff, limited to traffic in which there is no other line haul involved. This intra-terminal and inter-terminal and intra-plant switching is in the nature largely of a substitute for drayage service to get a car from one industry to another both within the confines of the City of Portland. This applies only within the City of Portland, independent of how the car came into Portland in a line haul movement. The rates do not apply where the car has been line hauled by any common carrier. If the car has been line hauled for instance from Spokane to Portland, and if it requires a switching service to get it to any particular industry in any part of the city, that switching would be covered by what is called the line haul tariff, that is, in an entirely different tariff from the zone switching tariff. This zone switching tariff applies only to independent movements of freight from one point to another in the city. Thereupon the current zone switching tariff, with all supplements, was offered by the plaintiff and received in evidence as plaintiff's Exhibit 2, without objection. Thereupon there [46] was offered and received in evidence, the map showing the switching zones within the Portland switching district, as plaintiff's Exhibit 1, without objection.

By separate agreement the switching revenues

(Testimony of R. W. Pickard.)
received under this tariff are divided equally between the carriers that participate in the switching movement. So that if there were only two carriers in the service they would divide the switching revenue equally between them.

At the Guild's Lake terminal there is located a make-up and break-up yard of the defendant company—that is a yard where trains are made up and broken up, and there are also other facilities there. When the S. P. & S. has a car of oil given to it at Willbridge with shipping directions or bill of lading that requires transportation, for illustration, to Eastern and Western Lumber Company, that car is hauled to Guild's Lake and there turned over to the Terminal Company for further movement to the Eastern and Western plant. In that case two carriers would participate and whatever the tariff rate is they would divide the revenue between them.

COURT: That is where you make the connection at Guild's Lake?

Mr. HART: Instead of using the term delivery, I would say interchange, because deliveries might connote destination. But Guild's Lake would be the point at which the S. P. & S. would turn over the shipment to the other carrier. That is correct.

A. Yes, that is the recognized point of interchange with the Terminal Company.

(Testimony of R. W. Pickard.)

If the transfer were to the Southern Pacific or Union Pacific the Terminal Company acts for the other railroads and would take the car in interchange. If, for instance, the [47] S. P. & S. had a car of oil that the Standard Oil Company gave it, at Willbridge, and the shipping direction or bill of lading, called for the movement of it to the Libby plant on the east side, which is on the Southern Pacific track, the S. P. & S. would turn that over to the Terminal Company at Guild's Lake interchange, as agent for the Southern Pacific Company, and that would virtually be S. P. & S. and Southern Pacific transportation.

The phrase "company material" is applied to commodities that are owned by one of the companies participating in the transportation of them. If S. P. & S. were given, by the Standard Oil Company, at Willbridge, a car of oil, and a bill of lading issued, calling for the transportation of that oil, for instance, to the Southern Pacific Company at its Brooklyn yards, what we would do with that car would depend upon the bill of lading that was issued at Willbridge. If it called for Southern Pacific, as consignee, the destination as Brooklyn, there is also a space provided on the Standard Oil Company's bill of lading for a routing, and if that routing were designated by the shipper as S. P. & S. we would turn the car over to the Southern Pacific at Guild's Lake interchange and the Southern Pacific, being the consignee, would

(Testimony of R. W. Pickard.)

pay the prescribed switching rate from Willbridge to Brooklyn, and the money thus collected would be divided half-and-half between the two carriers. If the shipment was billed to the Southern Pacific Company at Guild's Lake, which could be done, our contract with the shipper for carriage would cease at Guild's Lake interchange, and we would collect the switching charge from Willbridge to Guild's Lake, and the Southern Pacific would handle it in any manner it saw fit, [48] and we, having made delivery, the Southern Pacific would have full control over it on arrival at Guild's Lake.

The tariff, Exhibit 2, was originally built, or contructed, on the basis of naming all of the industries located within the zones, and it has been, since the original issue, during Federal control in 1918, supplemented from time to time in a network to keep it up to date in that respect by adding industries, or taking them away, as the case might be. If an industry went out of business the name was eliminated; if a new industry came in it was added with the purpose of at all times keeping it as nearly as possible an up to date guide as to the location for these industries within the given zone. The particular location of the industries in the zone is not a matter of importance so far as the application of the rates named in the tariff is concerned, but it is of importance to determine in what zone an industry might be located for the information, we will say, of someone unfamiliar

(Testimony of R. W. Pickard.)
with the territory. It would not make any difference in what part of the zone an industry was located for the rates to all points in that particular zone would be the same. The industries located in these different zones are listed alphabetically in Exhibit 2. For example, under "A" you will find the name Albers Dock No. 1, Zone 1. Similarly under the caption "C" California Packing Company, Zone 6. That might be followed right through with all of the letters of the alphabet.

> "MR. WILSON: Is it your contention, Mr. Hart, if no track is designated in that alphabetical list, you cannot make a delivery on any such track?
>
> MR. HART: No." [49]

Returning to the question of transportation of company material. I gave the illustration of a shipment consigned to the Southern Pacific at Brooklyn. The Southern Pacific might take delivery at the point of interchange, and, in that event, the only switching charge that would be collected would be simply the one covering the S. P. & S. where the shipment was turned over to the Southern Pacific. Whereas, if it was billed to Brooklyn, then the Southern Pacific would be a participating carrier, and the switching charge would be collected for the entire movement from Willbridge to Brooklyn, and then divided equally between the two.

(Testimony of R. W. Pickard.)

"Q. Take then the case of a shipment of oil consigned to the Northern Pacific Terminal Company at the Union Depot, passenger depot, if that was billed Guild's Lake what would be done with it?

A. If that was the way the bill of lading read, we would deliver it to the Terminal Company on the Guild's Lake interchange and consider we had performed all of the service we were called upon to perform on the bill of lading, and apply the rate for switching.

Q. From Willbridge to Guild's Lake?

A. Yes."

And in that case the Terminal Company would not be interested in the tariff switching except for payment of our charges to Guild's Lake interchange. Their own movement from Guild's Lake to Union Depot would be something exclusively within their own control, and they would not charge or collect, or participate in the tariff switching revenue, but if the shipment was billed to the Terminal Company at Union Depot, which is in Zone 1, we would apply the rate from Zone 5, where the Standard is located at Willbridge, to Zone 1, and divide [50] the revenue with the Terminal Company on the agreed basis. In that case the Terminal Company would be a participating common carrier, sharing in the switching tariff movement and sharing in the revenue.

(Testimony of R. W. Pickard.)

"Q. Now then, on shipments that are consigned to the Terminal Company, Guild's Lake, without any further statement in the shipping direction or bill of lading, state whether or not the Terminal Company is free to make any disposition it desires of the shipment after it has received it from the S. P. & S. at Guild's Lake.

A. The bill of lading or contract of carriage governs. Those directions we get from the shipper and not from the consignee. When he presents a bill of lading consigning a car of oil to the Terminal Company at Guild's Lake, and we interchange it and deliver it there, we have completed our contract.

Q. Now, let us carry that illustration a bit further (These questions, your Honor, are designed to try to make clear the controlling influence of the bill of lading or shipping direction given by the shipper): Take the case of a car billed to the Terminal Company at Guild's Lake, the contention made by the defendant in this case is that the Terminal Company should have half of the switching revenue because it has moved that shipment somewhere from that point, from the point of interchange. But if that is so, could the Terminal Company take such a shipment and move it all the way to the Union Depot on its own account and still collect half of the S. P. & S., still take half of the S. P. & S. switching charge from Willbridge to Guild's Lake—couldn't it?

(Testimony of R. W. Pickard.)

A. No they couldn't take half of the S. P. & S. switching charge.

Q. Stop and see if they could not. I am talking about a case now where a car is brought from Willbridge to Guild's Lake, consigned to the Terminal Company at Guild's Lake, and turned over to the Terminal Company there. Now, then, they do what they please with it, and they say to you, "We must have half of the switching charge from Willbridge to Guild's Lake because we have to do something more with it." But they actually move it from their interchange track to the Union Depot. In such a situation, if their contention is correct, would they not then be collecting half of the S. P. & S. revenue?

A. Under such a condition, they would. I wasn't clear on your question the first time."

[51]

Guild's Lake is in Zone 5, and the oil spur at Guild's Lake is also in Zone 5, close to the switching track, and the rate from the origin point, either to the interchange track or oil spur at Guild's Lake, is the same. If the oil belonged to some other concern than the Terminal Company, and was carried into Zone 1, there would be an additional charge. In that case the oil would be billed through from the point of origin to point of destination as one charge and it would be divided between the two carriers. The oil here in question

(Testimony of R. W. Pickard.)

was all billed to Guild's Lake. When a car of oil is consigned to Terminal Company, billed to Guild's Lake, the car is delivered to the Terminal Company on one of these interchange tracks at Guild's Lake, and they could send it to the Union Station, or to San Francisco, or any place it might wish to dispose of it, and it could rebill it, and the new transportation that has to be undertaken would have nothing to do with the S. P. & S. and the S. P. & S. would have no knowledge of it at all; and if this contention of the defendant is correct they could still get half of the S. P. & S. revenue on this switching from Willbridge to Guild's Lake, provided the Terminal Company was consignee. In such a case the S. P. & S. has no means of knowing whether the cars are actually moved into the oil spur at Guild's Lake and unloaded there, or whether it is taken someplace else. The S. P. & S. is governed entirely by the bill of lading that is tendered by the shipper, and not by the consignee. So far as we have been able to find from the records available the bill of lading destination specified by the shipper in all of these shipments was Terminal Company at Guild's Lake. The records, back of 1928, I think, have been destroyed. I have some bills of lading—I think another witness will have probably a more complete set but these are typical of the bills of lading issued on these shipments, at least. [52]

(Testimony of R. W. Pickard.)

On

CROSS-EXAMINATION

by Mr. Wilson, witness further testified:

The bill of lading, which is handed me, I would not say was typical of the billing of shipments in this case from the Standard Oil Company to the Terminal Company from our records. This particular shipment is billed to the Terminal Company, destination Guild's Lake, Portland. The information which we have indicates that in the early years of this movement shipments were merely billed Northern Pacific Terminal Company, Guild's Lake, without further designation. This bill of lading purports to be a carbon copy of one of the bills of lading that were made out by the Standard Oil Company and presented to our agent at Willbridge for signature. It is marked "copy" and appears to be a copy and that is the signature of our agent, and I think it is a copy of the bill of lading issued on one of the shipments involved in this controversy.

This bill of lading reads, "consigned to Northern Pacific Terminal Company, Guild's Lake, Portland, State of Oregon. Route, S. P. & S.—N. P. T." N. P. T. in connection with the route suggests nothing to me. Normally such a designation as N. P. T. would indicate that the Terminal Company was to participate in the transportation but on this bill of lading with the destination shown as Guild's Lake where we deliver the shipment it means nothing.

(Testimony of R. W. Pickard.)

Whereupon said bill of lading was offered and received in evidence without objection and marked defendant's Exhibit A.

> COURT: What significance, Mr. Wilson, do you attach to those initials?
>
> Mr. WILSON: The significance I attach to them is this: That the Standard Oil Company when it made out that bill of lading understood [53] that both the Spokane, Portland and Seattle Railway Company and the Northern Pacific Terminal Company were to be carriers on the line from the point of origin to the point of destination.

On my direct examination, I stated, that if the Spokane, Portland and Seattle Railway Company received a shipment from Standard Oil Company directed to the Southern Pacific, Guild's Lake, and it were so billed by the shipper, the Spokane, Portland and Seattle Railway Company would take the entire revenue, and if it were billed Southern Pacific, Portland, Oregon, with routing designated in bill of lading S. P. & S.—N. P. T. if I were agent at Willbridge or Linnton I would not accept the shipment, I would ask for some point of delivery to be designated on the bill of lading. If the point of delivery, as specified by the agent of the shipper said "up in the Union Station Yard" I would ask him to modify his bill of lading accordingly and I would divide the revenue with the Terminal Company on a fifty fifty basis if it were

(Testimony of R. W. Pickard.)

billed to the Southern Pacific Union Depot. If it were billed to the Southern Pacific Guild's Lake repair shop, routed S. P. & S.-N. P. T. I would apply the rate applicable to the zone and divide the revenue fifty fifty with the Terminal Company. If it were billed Southern Pacific, East Portland, routing S. P. & S.-S. P. I think that car would be delivered to the Terminal Company as agents for the Southern Pacific at the Guild's Lake interchange and we would divide the revenue with the Southern Pacific. [54]

In these cases I am considering, the fact that the oil is the property of the Southern Pacific would make no difference in our division of revenue. I do not know whether we are receiving and accepting billings Southern Pacific East Portland, routing S. P. & S. and S. P. There is a movement of fuel oil for the Southern Pacific Company today but how it is being billed I cannot tell you. The paper you hand me, by its heading purports to be a Southern Pacific Company switching settlement statement which is an accounting department record. It would indicate a movement of two cars of fuel oil from the Richfield Oil Company to the Southern Pacific at East Portland and the revenue was divided fifty fifty. The junction of interchange not being shown.

There is no question in my mind that the interchange point was Guild's Lake yard but this paper does not represent, in any way, the directions of the shipper to the S. P. & S. I cannot say whether

(Testimony of R. W. Pickard.)
this shipment was billed to the Southern Pacific at East Portland. It is an accounting department record and not a bill of lading. It is a fact that the Southern Pacific could have a shipment billed from Richfield Oil Company at Linnton to it at East Portland, and take it right on through to Brooklyn and pay the S. P. & S. only its proportion of the revenue accruing up to East Portland. I am not prepared to say whether or not this is done.

Under the rulings of the interstate commerce law the railway company, may, with its company material, either bill it to the nearest junction point or bill it through where a through rate exists, whichever is the most advantageous to it. [55]

I think the Southern Pacific is billing its shipments of fuel oil to East Portland and carrying them right through and sending them out to Brooklyn. I think that is what is going on. I think they are billing it and taking advantage of whatever plan is most advantageous to them. From the switching statements, now handed me I am unable to say whether or not the Northern Pacific Company is shipping today from the Sunset Oil Company, or has been since January 1, 1933, from its plant at Linnton, or, that on such shipments the S. P. & S. is delivering cars to the Terminal Company at the transfer track, and that the Terminal Company picks it up there and takes it over to the roundhouse, and puts it into the identical tank that it unloads its own fuel oil into. These records are

(Testimony of R. W. Pickard.)
accounting department records but obviously from them the movement is occurring but what the direction of the shipper is is something I cannot tell from the accounting department records, but these accounting department records indicate that there is a movement between Linnton and some point on the Terminal Company but such records do not show where the delivery is made or anything, they simply indicate that there is a movement of fuel oil between Linnton and some point on the Terminal Company but do not even indicate it is Northern Pacific Railway Company fuel oil. These records do not show either consignor or consignee. The copy of the bill of lading issued by the S. P. & S. on March 10, 1934, covers two carloads of fuel oil covered by one bill of lading, shipped by the Sunset Pacific Oil Company at Linnton, consigned to the Northern Pacific Railway Company. Destination is shown as Northern Pacific Terminal Company. Oil Spur, Portland, Oregon, routing S. P. & S. The destination as billed, would indicate that it is going on an oil spur on [56] the Terminal Company's tracks, although the routing is not complete. The phrase "Northern Pacific Terminal Company, Oil Spur", as the destination would imply that the oil spur is located someplace on the Terminal Company's track. Said bill of lading was offered and received in evidence, marked Exhibit "B". Even if that "Oil Spur" were not on the bill of lading we would make delivery to the Northern Pacific

(Testimony of R. W. Pickard.)
Terminal Company at Guild's Lake Yard and consider our service was ended because the only routing shown on the bill of lading made out by the shipper is S. P. & S.

Q. (Mr. Wilson) Is it your contention here—let me get this right—that if this oil on which this controversy is now based had been billed by the Standard Oil Company to the Northern Pacific Terminal Company, oil spur, Portland, Oregon, or Northern Pacific Terminal Company, oil spur, Portland, Oregon, then the Northern Pacific Terminal Company would have been entitled to participate in the revenue? Is that correct?

A. Yes, if the bills of lading had been tendered showing the Northern Pacific Terminal Company as the consignee, or destination the Northern Pacific Terminal Company oil spur, Guilds Lake.

If Guilds Lake were omitted, and the destination Oil Spur, Portland, Oregon, and the routing S. P. & S.-N. P. Terminal Company I think there would have been no question. If the bill of lading read "The Northern Pacific Railway Company, N. P. Terminal Co. Oil Spur, Portland, Oregon, route S. P. & S. I think, if I were accepting the shipment I would ask some questions of the shipper first as to what routing that shipment should take; S. P. & S. obviously not being able to make delivery to

(Testimony of R. W. Pickard.)

the billed destination. The shipment, under defendant's Exhibit "B", reading as above designated, to wit:- "The Northern Pacific Railway Co., N. P. Terminal Co. Oil Spur, Portland, Oregon, route S. P. & S", was apparently transported. While I cannot say definitely what was done with it I imagine the car was delivered to the Terminal Company at Guilds Lake, and that it [57] is a fair assumption that it was moved by the Terminal Company over to the oil spur at the roundhouse in Guilds Lake, and I think in that situation the revenue would be divided fifty fifty, between the S. P. & S. and the Terminal Company, or with the Northern Pacific Railway Company, through the N. P. Terminal Company or vice versa.

"Q. Let me get that right. You have drawn a distinction which obtains. You said that the oil to the Southern Pacific, if it were billed to the Southern Pacific at the Union Station, the Southern Pacific would not participate in the revenue, but the Terminal Company took half the revenue? Isn't that correct?

A. Yes.

Q. In that kind of shipment, the Terminal Company is not considered an agent of the Southern Pacific unless some part of the haul is on the line of the Southern Pacific independent from the Terminal Company. Isn't that correct?

(Testimony of R. W. Pickard.)

A. In case of the shipment going to the Union Depot?

Q. Yes.

A. Billed Southern Pacific, Union Depot?

Q. Yes.

A. No, I would consider them as the agent of the Southern Pacific.

Q. Even when it does not go off the Terminal Company's track?

A. Yes. I don't know whether—go ahead, ask me another question, and I will answer that a different way.

Q. All right. You know, don't you, that the Northern Pacific Railway Company does not participate in any of the revenue on the oil from Linnton to the oil spur, Guilds Lake?

A. As a railroad?

Q. As a railroad?

A. That is correct. [58]

Q. And that the entire revenue is paid to the Terminal Company, as a railroad? I mean the entire half of the revenue.

A. That is correct, I think.

Q. Now, isn't the reason for that that the Northern Pacific Railway Company does not participate in any part of the haul independent of the Terminal Company?

A. They would not in the case of this Exhibit "B".

Q. Well, wherein does that differ from the

(Testimony of R. W. Pickard.)

illustration I gave you with the Southern Pacific delivery at the Union Station?

A. I don't think it is different. If I remember correctly, your Southern Pacific case was a car of oil billed to the Southern Pacific at the Union Depot.

Q. Yes.

A. Now, what is it you wish to ask about that?

Q. I say, would or not the Southern Pacific participate in the revenue on that oil?

A. No. The Terminal Company would be the carrier. Presumably specified by the shipper as the carrier.

It was stipulated between the parties that a shipment of car wheels originating in the S. P. & S. yard at Portland consigned to Pullman Supply Yards in Guild's Lake Terminal, was carried and transferred to the Terminal Company and carried by the Terminal Company to the Pullman Supply Station or Warehouse in the Guild's Lake yard, and that the S. P. & S. and the Terminal Company divide the revenue, and it was also conceded that the Pullman Company Warehouse is just 200 feet along the same track beyond the oil delivery place (oil spur) at the roundhouse. In reference to this stipulation defendant maintains that this is not a case of company material and that the Pullman Company, in this regard, is like any other shipper. [59]

(Testimony of R. W. Pickard.)

COURT: The question in this case is whether delivery should be made at Guilds Lake interchange, or whatever you call it?

Mr. HART: The S. P. & S. turns it over in any event to the Terminal Company at the interchange track. Now, the question is whether that is completion of the switching movement that was contracted for.

COURT: In other words, whether the obligation is at an end there. If your obligation is at an end there?

Mr. HART: Our obligation is at an end.

COURT: Is that your contention here, or whether you have to take it on to the end, whether you have to have the services of the Northern Pacific Terminal Company, whether the switching service that was contracted for down there at Willbridge included something more. In other words, whether it includes that that shipment should in the end be taken to Guilds Lake or some place else. If your obligation requires you to take it to its end, and you deliver it to the Terminal Company at Guilds Lake, then there would be in fact two carriers operating, wouldn't there?

Mr. HART: That is Mr. Wilson's contention.

COURT: That is the only thing there is to the case, isn't it: Whether or not on the bill of lading you were to deliver it one place, or whether it had to go to another?

(Testimony of R. W. Pickard.)

Mr. HART: That is correct. Of course, they would do the actual delivering.

COURT: If you had to have the services of the Terminal Company in order to complete delivery, then the revenue should be divided?

Mr. HART: Yes.

COURT: Am I right?

Mr. WILSON: I agree with you thoroughly.

When I said that all of the lists of the industries' spurs were included in the switching tariff offered here as Plaintiff's Exhibit 2, I do not mean to say that delivery could not be made on tracks, other than those indicated in the alphabetical list.

Referring to plaintiff's Exhibit 2, the Southern Pacific is listed as being in Zone 2, Southern Pacific hop warehouse, Southern Pacific open dock and not otherwise. On shipments of oil consigned to Southern Pacific at East Portland, I would think they might or might not be delivered at either one of those points—it is problematical. [60]

As a matter of fact I know that all of the oil we are shipping over the Southern Pacific consigned to East Portland is not going to one or other of the places listed. I don't find the Pullman Company's industrial track on this Exhibit (plaintiff's Exhibit "2"). I cannot say that all the car wheels that are put on the Union Pacific cars, and those put on the Pullman Company's cars, and those on the Southern Pacific equipment, and those put on

(Testimony of R. W. Pickard.)
the Great Northern equipment, are all shipped down there to those various individuals, as we do not handle them but it would not be unusual for there to be such shipments to a terminal of that character.

In a general way the agreement between the Terminal Company and the S. P. & S., with reference to transfers, is that a terminal company officer designates the track that the transfer shall be made on on loads coming to the Terminal Company. On loads coming to the S. P. & S. it is the common practice for the S. P. & S. to designate what track shall be the transfer track. For instance, if the Terminal Company had a track south of Guild's Lake Terminal, and north of Nicolai Street, and it designated to the S. P. & S. that that should be the transfer track on cars delivered from the S. P. & S. to the Terminal Company, I believe it would be within its rights, to do so. On shipments of oil coming from Willbridge, consigned to the Terminal Company at Guild's Lake, I would not consider that a delivery had been made if the transfer track were located on the south outside of Guild's Lake. [61]

If the interchange point were outside of Guilds Lake on shipments of oil coming from Willbridge, consigned to the Terminal Company at Guilds Lake, I would consider the billing sufficient to permit the Terminal Company to participate in the revenue.

The letter you hand me was written in my office,

(Testimony of R. W. Pickard.)

by my authority, and purports to be in response to the one immediately preceding it, addressed by E. L. Brown, comptroller of the Terminal Company, to Mr. H. Sheedy, agent, S. P. & S. Railway Company, it being stipulated between the parties that these letters might be admitted without further identification. Whereupon said letter, dated August 18th, 1926, was received in evidence and marked defendant's Exhibit "C", and the letter of August 26th, 1926, in answer thereto was received in evidence, marked defendant's Exhibit "D", which letters were read as follows:

August 18, 1926

Mr. H. Sheedy, Agent,
Spokane, Portland & Seattle Railway Co.
Portland, Oregon

Dear Sir:

Upon investigation of cars delivered by S. P. & S. Ry. to Nor. Pac. Terminal Company of fuel oil, billed to N. P. T. Co., we find all the revenue is absorbed by the S. P. & S. Ry. We think this practice is wrong as under the switching tariff the Nor. Pac. Terminal Co. should get 50% of this revenue.

We have had this matter up with our General Yardmaster and he reports as follows:

"S. P. & S. merely deliver to us in transfer at Lake Yard loaded. We set cars to roundhouse and heating plants for unload-

(Testimony of R. W. Pickard.)

ing. When cars are empty we return to S. P. & S. (Deliver them into their Yard).'

[62]

It is manifestly evident that the Terminal Company performs a part of the switching after receiving the cars from you, also in delivering the empty cars back to your yard. Under the arrangement of the zone switching tariff, we are entitled to 50% of the revenue where two companies participate in the switching.

Please acknowledge receipt.

Your truly,

E. L. BROWN".

The letter of Mr. Pickard reads as follows:

Portland, Oregon, August 26, 1926.

Mr. E. L. Brown, Comptr.,
Northern Pacific Terminal Co.
Portland, Oregon.

Dear Sir:

Your letter August 18th, file C-141, addressed to Mr. H. Sheedy, has been referred to this office.

Inasmuch as these cars are consigned to the Terminal Company, inso far as the SP&S is concerned, when they are set by us on the interchange with your line we are no longer interested in what is done with them. Delivery has been made to the Terminal Company at the

(Testimony of R. W. Pickard.)

nearest point and to give you a refund through the subterfuge of permitting you to participate in the division by reason of your switching it from the interchange over to the roundhouse, it seems to me would be nothing more or less than a modified form of rebating, in view of the oft expressed opinion of the Interstate Commerce Commission that a carrier performing service for another carrier, as we are doing for you in this instance, must make the same charge against such other carrier as they would contemporaneously make against any other shipper or consignee.

Your truly,

R. W. PICKARD,

General Freight Agent". [63]

Guilds Lake covers not only the make up and break up yard but also the roundhouse and other facilities at that point; they have a place for car storage and cleaning, and I imagine have a large supply warehouse there where they keep general supplies for their equipment, and I am sure that they have car repairers down there making repairs on the cars. Guilds Lake covers not only this so called make up and break up yard but it covers all of the tracks and facilities there. It is called the Guilds Lake terminal. What the designation on a bill of lading "Guilds Lake" might mean from the standpoint of the shipper is questionable.

(Testimony of R. W. Pickard.)

Q. Is there any place to take delivery of a shipment in what you call the make-up and break-up yard?

A. That would be entirely possible of any one of those tracks.

Q. I mean, you would have to dump it out on the ground? There are no platforms there to deliver shipments, are there?

A. Speaking of fuel oil, a tank car can be drained almost any place.

Q. Right on the ground; but they don't ordinarily do that, do they?

A. No, they do not.

Q. And these four or five thousand cars, or whatever they are, you don't think they have so drained on the ground out in the make-up and break-up yard, do you?

A. No, no.

The S. P. & S. have no interest in the Guild's Lake [64] yard whatever. They have no running right on the tracks in the yard, other than a working arrangement for making an interchange, and if the Northern Pacific Terminal Company had not designated that track as a transfer track the S. P. & S. would not have the right to even turn a switch to get in there.

RE-DIRECT EXAMINATION

For instance the Oregon Electric Company, which runs from Portland to Eugene—if the Oregon Elec-

(Testimony of R. W. Pickard.)

tric bought a piece of electrical equipment from the General Electric Company in New York, and wanted that equipment brought to Eugene, Oregon, via Portland—the Oregon Electric could have that piece of equipment consigned to it at Eugene, and if it did so then the published tariff rate from New York to Eugene would apply and the Oregon Electric would have a share or what they call a division of that through rate. If more advantageous, the Oregon Electric could have that piece of machinery consigned to it at Portland, and take delivery at Portland, and then move it down to Eugene in any way they saw fit. In that case the Oregon Electric would not be a participating carrier and would have no share in the rate collected for the common carrier transportation, and when it moved it to Eugene it would simply be out whatever it cost to haul it down there; similarly, the Northern Pacific Company buy oil at Willbridge or Linnton which they might want to use at the Union Depot, in which event, the tariff rate covering the movement from Zone 5 into Zone 1 would be collected, and then the amount collected would be divided equally between the S. P. & S. and the Terminal Company, or if the Terminal Company found it more to its advantage that shipment could be billed to the Terminal Company at Guild's Lake, or Guild's Lake yard, or Guild's Lake Terminal, whichever they might choose to call it, [65] then in that case the Terminal Company, as the consignee,

(Testimony of R. W. Pickard.)
would take possession of that shipment at Guild's Lake and the only tariff charge that would be collected for that movement would be the tariff charge applicable from Willbridge to Guild's Lake.

On shipments billed to the Terminal Company at Guilds Lake, the Terminal Company could, as consignee, if it desired, take delivery right on the interchange track, and that is exactly what was done. On these shipments, billed to the Terminal Company at Guilds Lake, there was no restriction of any kind upon what the Terminal Company could do with them after they got them on the interchange track. They could unload them right there if they wanted to transfer them to another car, or they could consign them to the Depot in another zone, or any where else, or they could leave them right there on the interchange track in which event there would be no right to a fifty fifty division or to charges for moving that shipment from Willbridge to Guilds Lake Yard.

RE-CROSS EXAMINATION

The Terminal Company never directed us or stated to us that they would take delivery on the transfer track. We had no special instructions—we were complying with the bill of lading instructions from the shipper.

Q. Did the Standard Oil Company, the shipper, ever direct you to make delivery to the Terminal Company on that transfer track?

(Testimony of R. W. Pickard.)

A. Yes, by simply designating Guilds Lake on the bill of lading. * * *

Q. But otherwise than by their bill of lading, they never instructed you to make delivery on that transfer track?

A. Those are the only instructions we ever get from the shipper, is the bill of lading.

Q. Then would you consider a bill of lading such as Defendant's Exhibit "A", which designated [66] the route as S. P. & S. and N. P. T. Co. a direction to deliver it on a transfer track?

A. That would be my understanding of the instructions of the shipper on this sort of bill of lading.

Q. With that routing?

A. Yes.

Q. Where then did the N. P. T. participate in the carriage, or were they supposed to participate in the carriage?

A. I think the designation of N. P. T. as part of the route on this bill of lading, where the designation is reached by the originating carrier, is of no consequence to the carrier.

Q. In other words, disregard N. P. T. Company in that routing?

A. Yes.

J. A. JOHNSRUD

called as a witness on behalf of the plaintiff and testified as follows:

I am chief clerk of traffic accounts for the S. P. & S. I have had charge of the freight and passenger accounting of the S. P. & S. for a little over three years. I have been connected with the accounting department from 1910 to 1920, and again from 1927 up to the present time. In my present position I have custody of the records dealing with the accounting on switching in Portland. The bills of lading, you hand me, dated from January, 1931, to January, 1932, are shipping orders issued by Richfield Oil Company for the movement of cars of fuel oil from Linnton, Oregon, to the Northern Pacific Terminal Company at Guild's Lake. They are the original records of the agent [67] at Linnton. I have examined the bills of lading covering the movements of such fuel oil from Linnton to the Terminal Company, from the 1st day of January, 1930, through 1931, and would say they are commonly made out in the same way for such shipments so far as the destination is concerned. Whereupon these bills of lading were marked plaintiff's Exhibit 3.

"COURT: Is there any particular place on Guild's Lake that is generally known, or known in railroad circles, as Guild's Terminal?

Mr. HART: I think, your honor, we all understand that the term generally means that it is the district".

(Testimony of J. A. Johnsrud.)

The movement of fuel oil to the Northern Pacific Terminal Company from Willbridge began in 1923, and continued up to 1930. The bills of lading, so far as copies are now available, show that the oil was billed by the Standard Oil Company of California, to the Northern Pacific Terminal Company, at Guild's Lake, Oregon. In other words, Guild's Lake, routed S. P. & S.-N. P. T.

The question of dividing the switching revenue first came up in August, 1926, that is when the letters, that we have already referred to, occurred. From 1923 to 1926, the S. P. & S. retained the entire switching revenue for the movement. During those three years I have no record of any claim by the Terminal Company that it was entitled to share in the switching revenue. The letters show that in [68] August, 1926, the comptroller of the Terminal Company made a demand to be allowed to share equally in the switching revenues. Mr. Pickard answered, on August 26th., saying that he thought it would be unlawful, and after this rejection by Mr. Pickard, I have no further record of any claim on the part of the Terminal Company until 1930; so that for the seven years in which the Terminal Company was getting its oil at Willbridge, and having it shipped in this way, from Willbridge to Guild's Lake, the S. P. & S. took the entire revenue.

In January, 1930, the movement from Willbridge was discontinued and the Terminal Company began

(Testimony of J. A. Johnsrud.)

buying their oil and having it shipped from Linnton. After the Terminal Company began shipping their oil from Linnton the switching revenue was divided between the Terminal Company and the S. P. & S. on a fifty percent basis.

Sometime in the past it was determined that the Portland Electric Power Company was entitled to share in the switching revenue on shipments moving to that company. I think somewhat based on that interpretation, we permitted the N. P. Terminal Company to retain half of the revenue, with an understanding that the haul extended beyond the interchange track at Guild's Lake. That division of the switching revenue began in January, 1930. On April 1, 1932, the Terminal Company made demand that the same division of switching revenue be made with respect to the past shipments that had moved from Willbridge. That is they wanted the S. P. & S. to make an adjustment on shipments moved from Willbridge prior to January 1, 1930. Pursuant to that demand the S. P. & S. went back three years from April 1, 1932 and adjusted the accounts by paying over to the Terminal Company one half of the switching revenues [69] on these Willbridge-Guild's Lake oil shipments between April 1, 1929, and April 1, 1932, or to be accurate between April 1, 1929, and December 31, 1930, because December 31, 1930, was the date on which the Willbridge shipments ended. In other words, the S. P. & S. made this adjustment as to Linn-

(Testimony of J. A. Johnsrud.)

ton shipments, when the shipments began moving from that point, and the S. P. & S. honored the Terminal Company's request for a division of the Willbridge revenues, as far back as April 1, 1929, and that was all done based on the ICC ruling given by Mr. Hart on Portland Electric Power shipments just referred to. When the Linnton shipments commenced the S. P. & S. divided the switching revenue with the Terminal Company without a demand from the Terminal Company based on the ruling. As to the oil that had moved from Willbridge—the first demand made by the Terminal Company, after the 1926 demand, was in April, 1932. We had discontinued giving the Terminal Company this division when the business from Linnton discontinued. It was then that the present controversy came up. It was in March, 1933, that we rebilled the Terminal Company for the revenue that we had allowed them. There were no further Terminal Company shipments after that date.

"COURT: Prior to 1926, did you have shipments of oil and fuel, the same character of shipments prior to 1926 for the Terminal Company as you had since then?

A. Yes.

Q. The bills of lading read substantially the same.

A. Yes.

Q. And delivered at this exchange place?

A. Yes. [70]

(Testimony of J. A. Johnsrud.)

CROSS EXAMINATION

When I say there had been no demand made upon the S. P. & S. for an adjustment of the switching revenues from the inception of this business I am speaking simply from the state of the correspondence between the two companies. I did not come to Portland until 1927. It is possible that there may have been discussions between the railroad officials on the question of dividing the switching revenues but I have no knowledge of it. When I say that after 1930, when this adjustment was made, that there was no demand for back adjustments until 1932, I am also speaking from the correspondence. When I say that the next demand was in 1932 I am referring to a letter of April 1, 1932, from Mr. Shibell, the comptroller of the Terminal Company, addressed to Mr. Crosbie, comptroller of the S. P. & S. Whereupon the letter of April 1, 1932 is offered and received in evidence without objection and marked defendants Exhibit "E", and reads as follows:

April 1st, 1932

Mr. Robert Crosbie, Comptroller,
Spokane, Portland and Seattle Railway Co.
Portland, Oregon.
Dear Sir:

Please be referred to your letter dated April 18, 1930, file TR 382-N, relative to switching charges on fuel oil consigned to Northern Pacific Terminal Company.

(Testimony of J. A. Johnsrud.)

Corrections of the switching charges as reported by your agent at Linnton, Oregon, on statements issued to January 1, 1930, were made on statements No. 8, 19, 20, 21 and 22, to the Northern Pacific Terminal Company, April 1930 accounts, and refund of the overcharge in the switching rate was made to the Northern Pacific Terminal Company through our Bill Collectible No. 14687, May 1930 accounts.

Since this time a check was made of all freight settlements, which developed that switching charges were not corrected on switching settlement statements, of all fuel oil for the Northern Pacific Terminal Company moving [71] from the Standard Oil Company's plant at Willbridge, Oregon, to the Northern Pacific Terminal Company's set out track at Guilds Lake, period February 1st, 1923, to December 31st, 1929. This would involve a reporting to the Northern Pacific Terminal Company of one-half of the zone rate of $8.55 per car, covering movement during that period.

Please advise if you will prepare settlement statement reporting this revenue to the Northern Pacific Terminal Company, or if it will be necessary for us to prepare a Bill Collectible versus the Spokane, Portland and Seattle Railway Company to recover our proportion of these switching charges.

Yours truly,

C. B. SHIBELL."

(Testimony of J. A. Johnsrud.)

The answer to that letter is dated April 25, 1932, the same being offered and received in evidence, without objection, marked defendant's Exhibit "F", and reads as follows:

"Portland, Oregon, File No. TR 382-N
April 25, 1932

Mr. C. B. Shibell,
Comptroller,
Northern Pacific Terminal Company,
Portland, Oregon

Switching Charges on Fuel Oil for Northern Pacific Terminal Company

Dear Sir:

Referring to your letter of April 1st, 1932, file 141V7 relative to adjustment of switching settlement statements in connection with fuel oil moving from Standard Oil Company's plant at Willbridge to the Northern Pacific Terminal Co. at Guilds Lake:

The statute of limitations on adjustment of state traffic is six years, all records previous to that time being destroyed, and this will be your authority to render bill against the SP&S for your proportion of switching charges on all cars moving April, 1926, and subsequent thereof.

Yours truly,
ROBT. CROSBIE—EJB." [72]

(Testimony of J. A. Johnsrud.)

Mr. Crosbie wrote to Mr. Shibell, by a subsequent letter, stating that he would only accept the corrections for the three-year period; that letter was for the purpose of correcting his letter of April 25, 1932, in which it was stated that the S. P. & S. would settle back to the statute of limitations of six years. The statute of limitations, as referred to in that letter, does not mean the legal statute of limitations but the statute of limitations under the railroad accounting officers rules. At one time the statute of limitations on adjustment of state traffic was six years but prior to 1932 it was reduced to three years, and, at the time the letter of April 25, 1932, was written, that was overlooked, and the letter of May 16th, was written when that was discovered. I do not mean to say that as between interstate shipments and state shipments that on the day the letter of April 25, 1932, was written, there was any difference in the date of settlement of the members of the Railway Accounting Officers Association, but prior to that time there had been a difference in interstate and intrastate settlements. The Railroad Accounting Officers Association rules are not covered entirely by interstate commerce commission rules. The rules of the Railroad Accounting Officers Association apply to subscribers to those rules. I do not know whether N. P. Terminal Company is a member of that association or not but the tenant lines are. The Railroad Officers Association limitation that I referred to reads as follows: [73]

(Testimony of J. A. Johnsrud.)

> "Time Limit for Adjustments—Interstate and Canadian Traffic not involving Adjustments with Shippers or Consignees. * * * Statements of differences received after the expiration of three years from the close of the month from which the original settlement was made may be declined except when such statements of differences are made on correction accounts as set forth in paragraph 89"

It is true that the provision also contains this note:

> * * * These rules do not apply to adjustment of divisions in dispute between freight traffic departments, to retroactive divisions, to settlements with the Government, or to divisions of Federal or State Commissions".

The S. P. & S. settled only for a period of three years on account of the rules contained in the railway accounting officers association, although we did not inquire as to whether the Terminal Company was a member of such association or had subscribed to those rules. In other words, if the Terminal Company had not been a member of the association the S. P. & S. would not have permitted them to adjust back for a period of six years because the stockholders of the Northern Pacific Terminal Company, or the tenant lines, were members of the association, and we insisted upon the Terminal Company abiding by the rules of that association, even

(Testimony of J. A. Johnsrud.)

though it be not a member, and had not subscribed or agreed to be subject to the rules. In my opinion the railway accounting officers association rules apply to all accounts between two carriers that are signatories to the rules. It is a fact that the claim of the S. P. & S. in this case covers shipments for a period of four and one half years prior to the filing of the complaint. The opinion in connection with the division of switching rates on company material going to the Portland Electric Company, composed of a letter from R. W. Pickard to Carey & Kerr, [74] dated November 24, 1926, and the second letter from Carey & Kerr to R. W. Pickard, dated November 30, 1926, were offered in evidence, and received without objection, marked as defendant's Exhibit "G", and were as follows:

"November 24, 1926.

Messrs. Carey & Kerr, Attys.
Yeon Building,
Portland, Oregon
Dear Sir:—

There is attached a copy of Henry's tariff No. 6-C which names switching rates between points in the Portland Switching Terminals:

We have oil storage tanks located in what is known as the Linnton and Willbridge district, said district being included in Zone 5 as described in item 70 of the tariff.

The P. E. P. Co. is a user of fuel oil and their storage tanks are located in East Port-

(Testimony of J. A. Johnsrud.)

land north of East Mill Street known in the same item of the tariff as Zone 8.

In item 75 of the tariff it will be noted there is a rate provided on traffic between zone 5 and 8 of $16.50 per car. The divisions governing the rates as agreed upon between the various lines are that they will divide equally as between the number of lines handling. A copy of the division sheet is also attached.

There are shipments of fuel oil moving from Linnton and Willbridge in zone 5 to the P. E. P. Co. in Zone 8. This fuel oil, however, is interchanged to the P. E. P. at our interchange track which is located in zone two and the switching rates from zone 5 to 2 is $14.00 per car. It has been our contention that on company fuel oil for the P. E. P. when we deliver the car to that line at our interchange with them in zone 2 the movement is complete because the shipment is given to them. They on the other hand contend that the shipment has not reached its destination until it is finally spotted at their storage warehouse in zone 8. If our contention is correct we would take the entire amount of zone 5 to zone 2 of $14.00 per car. If, on the other hand, the P. E. P. Co.'s. contention is correct; that is, that the shipment is subject to zone 5 to zone 8 rate and they out of that, for their handling from our interchange track to their storage warehouse, get 50% as

(Testimony of J. A. Johnsrud.)

per the division sheet [75] then the rate and divisions would be as follows: Zone 5 to zone 8 $16.50 of which the P. E. P. Co. would be entitled to $8.25, or 50%.

They contend under the Commission's Conference Ruling No. 225 that the rate to be charged against them is the rate we would charge to John Jones, for example, and while that is true it seems to me that our reimbursing them with 50% of the revenue would not result in them paying as much freight charges as John Jones for the reason that they would, through the medium of the division sheet, get 50% of it back.

Again there is a grave question as to whether under Conference Ruling 225 they are not entitled to have the shipment billed from zone 5 to their warehouse in zone 8, even though it is their own traffic, and participate in the division where that would give them a net transportation cost less than the zone 5 to zone 2 rate of which we keep all.

I would like your ruling on this for the reason that there are other movements of the same character involved, such as fuel oil from Willbridge to S. P. Brooklyn storage tanks located in zone 4 and from Willbridge to the N. P. Terminal storage tanks in Guilds Lake which is within the same zone; namely, 2, and whatever the ruling is in connection with the P. E. P.

(Testimony of J. A. Johnsrud.)

situation will likewise apply to the other traffic.

Briefly summed up it seems to be a question of whether or not the other companies at Portland are entitled to a divisional cut out of the switching revenue accruing on their own fuel oil.

Your truly,

R. W. PICKARD

EB:FH General Freight Agent".

"Portland, Oregon
November 30, 1926

Mr. R. W. Pickard, General Freight Agent,
Spokane, Portland and Seattle Railway
Company,
Portland, Oregon

We have your letter of the 24th instant enclosing copies of tariff stating Portland switching rates, which copies we return herewith.

It seems to us that the Portland Electric Power Company is right in this dispute and that the situation can be corrected only by a different arrangement [76] for divisions. The tap line division cases established the right of an industry to own a common carrier line which, if it was in truth a common carrier line, could legally share in the through rate. The Portland Company is in much the same situation as one of these industries owning a tap line. It can have its shipments consigned to

(Testimony of J. A. Johnsrud.)

their actual destination and participate in the division of the freight charge.

Ordinarily it is to the interest of a carrier which is also the consignee of a shipment, to fix the first junction point with the connecting carrier as the bill of lading destination so as to avoid the imposition of commercial freight rates for the full haul. In this case the advantage is the other way but we see no way of compelling the Portland Company to bill the shipment to the point of connection instead of its actual destination.

CAH:GK

Enclosures

CAREY & KERR"

I am familiar with the settlement made in connection with the oil shipments consigned to the Northern Pacific Railway Company from Sunset Pacific Oil Company, and the copies of shipping orders, which I have show that such shipments were consigned to the N. P. Terminal Company, Oil Spur, the shipping orders being dated March 10, 1934. A copy of a letter from Mr. Crosbie to Mr. Shibell, dated March 1, 1933, inclosing a copy of a bill of lading, dated February 22, 1933, was offered and received in evidence, without objection, and marked defendant's Exhibit "H". The bill of lading read: "Consigned to Northern Pacific Railway Company, Portland, Oregon. Route S. P. & S."

(Testimony of J. A. Johnsrud.)

"March 1st, 1933

Mr. C. B. Shibell, Comptroller,
Northern Pacific Terminal Company,
Portland, Oregon.

Switching N. P. Ry Co. Fuel Oil Cars

Dear Sir:

Commencing with January, 1933, there has been a movement of fuel oil from the Sunset Pacific Oil Company at Linnton, Oregon, to the Northern Pacific Railway Company, Portland, Oregon, on which we have been assessed the Zone switch rate of $8.55 per car, applying between industries within Zone 5. [77]

The attached bill of lading covers the movement of these cars on February 22nd, 1933, and you will note that they are billed directly to the Northern Pacific Railway Company at Portland, Oregon, no particular track being designated.

It is our understanding, however, that these cars are being unloaded at Guilds Lake Yard, and that the entire movement is within Zone 5. Will you kindly confirm this understanding and oblige.

Yours truly,

Robert Crosbie".

Mr. Hart: You will agree, of course, Mr. Wilson, that the Northern Pacific Railway Company is not able to participate in that movement, and that the Terminal Company had to do it. Is that correct?

(Testimony of J. A. Johnsrud.)

Mr. Wilson: I agree that the Northern Pacific Terminal Company participated in that movement, and that it made no difference in this particular case whether the thing was consigned to Portland, Oregon, whether the billing consigned it to Portland, Oregon, or whether it consigned it to Guilds Lake, or whether it consigned it to Oil Spur, Guilds Lake. The billing made no difference in this case, and they paid us our proportion of the switching charge, notwithstanding their claim."

The Northern Pacific Railway Company made a switching settlement between the carriers for the shipment shown in the bill of lading, defendant's Exhibit "H", and paid to the S. P. & S. fifty per cent of the switching charge in such settlement, and what settlement was made between the Northern Pacific Railway Company and the Northern Pacific Terminal Company, I do not know. It was made direct between the Northern Pacific Railway Company and the Northern Pacific Terminal Company. The shipment was delivered at the oil tank at the roundhouse at Guilds Lake.

Mr. HART: I don't see that you need take time on that. I am perfectly willing to concede that any shipment made to an outside consignee, like the Northern Pacific Railway, the Pullman Company, or any one else, the Terminal Company having participated in the

(Testimony of J. A. Johnsrud.)

switching movement, it was entitled to fifty per cent of the switching revenue.

Mr. WILSON: That covers that point exactly. Do you also concede, in view of this correspondence, that this oil was put in the oil tank at the oil spur at the round- [78] house at Guilds Lake.

Mr. HART: Wherever the Northern Pacific Railway Company wanted it put. They were the consignee.

COURT: You are willing to concede they put it any place they desired?

Mr. HART: Yes, the billing is everything, and when the consignee also claims to be the carrier the billing is everything.

The shipments of fuel oil to the Northern Pacific Terminal Company from any point within the switching limits on the S. P. & S. line ceased on March 28, 1932, and, in fact, the question of dividing the switching revenue on the earlier shipments to the N. P. Terminal Company did not come up until one year after the Terminal Company had ceased shipping from the oil companies located on the line of the S. P. & S. and originated by Mr. Crosbie's letter to Mr. Shibell, dated March 27, 1933, that is, one year after the shipments from the Richfield Oil Company ceased.

On all shipments at originated from the Richfield Oil Company, which shipments commenced on January 6, 1930, the Terminal Company paid the

(Testimony of J. A. Johnsrud.)

freight and was allowed to retain fifty per cent of the switching charge.

On the shipments from the Standard Oil Company, which were prepaid, the S. P. & S. agent collected the money, the S. P. & S. had the money and refused to give any of it to the Terminal Company.

On shipments from the Richfield Oil Company the shipments were not prepaid, the Terminal Company paid the freight and retained one half the charge.

Plaintiff thereupon rested. [79]

B. E. PALMER

called as a witness on behalf of the defendant, testified as follows:

I am manager of the N. P. Terminal Company of Oregon, and have been such since 1920. The interchange of cars from the S. P. & S. to the Terminal Company was established at Guilds Lake in approximately the year 1922. In establishing an interchange between these carriers, each carrier provides or designates a track as an interchange track. The S. P. & S. designated the tracks adjacent to the Admiral Dock as the interchange tracks on which it would receive business from the N. P. Terminal Company. The Northern Pacific Terminal Company designated as its interchange track any

(Testimony of B. E. Palmer.)

open freight track at the Guilds Lake make-up and break-up yard on which it would receive business from the S. P. & S. In making the interchange the S. P. & S. comes in on this switch, cut off their cars, and their engine would go on light, or, if they happen to have other cars go on with such other cars. The Terminal Company could have designated any other track for interchange purposes. It could have designated a track outside of Guilds Lake, it was its privilege to designate any track it chose. The S. P. & S. did not spot the cars in interchange at any place, it pulled in on a freight track and left the cars on the freight track. They could leave them on any vacant track. There were six tracks there and the freight yard is about three quarters of a mile long. These tracks do not extend the whole distance, in the middle longitudinally is a complete break between the tracks, except the two outside tracks. These tracks have previously been designated as the make up and break up yard. [80]

There are no facilities in that yard for unloading oil. The S. P. & S. makes two or three interchanges daily, and the Terminal Company cars are not segregated at the interchange by the S. P. & S. The average daily interchange from S. P. & S. is about forty to fifty cars; in the busy season it reaches as high as seventy cars. The Terminal Company had to perform a service with each car left at the interchange. Some cars might be for the Southern Pacific interchange, some for the Union Pacific, and some

(Testimony of B. E. Palmer.)

for the Terminal Company. All of these cars would have to be switched out. The Terminal Company cars were moved to the oil tracks. Union Pacific and S. P. & S. were moved to the interchange tracks at the Union Station. We had to pick out from the entire interchange the cars that were consigned to the Terminal Company. The cars consigned to the Terminal Company were moved to the oil spur for unloading, which is at least a half mile from the interchange track. If the cars were left at about the middle of the interchange tracks the Terminal Company would have to pick up the cars with one of its switching engines, moved it up there then backed it in on the track where the oil tank is located. This was entirely Terminal Company service, with its own power throughout, as the Terminal Company is the only one that is authorized to do any work within the Guilds Lake yard. At the oil spur there is located a sump into which the oil is emptied from the car and then pumped up into the tank, which is the at a higher elevation. From the tank it flows by gravity into the locomotive tank. Only one car can be unloaded at a time, and each car has to be spotted over the sump when unloaded. The oil storage tank holds approximately five carloads. [81]

In making an interchange the car to be interchanged is delivered on the interchange track, it is then inspected to see that it would pass the interstate Commerce rules of safety, defects, and in oil,

(Testimony of B. E. Palmer.)

gasoline and that sort, particularly, as to any leakage. After it is inspected and accepted, then the receiving road assumes full responsibility for the car.

A per diem is a charge made by one railroad to another for the use of the car. It is a fixed charge of $1.50 a car a day. The shipper pays no per diem. The shipper is charged demurrage if he holds the car longer than the free time allowed by the demurrage rules. The shipper is allowed twenty-four hours to unload the car and after that is charged a demurrage charge for longer detention of the car. The fuel oil shipments involved here, consigned to the Terminal Company, were interchanged with the Terminal Company. With reference to the per diem, switching roads are allowed four days reclaim under the rules, that is, four days in which to return the car without being charged a per diem for use thereof but are not charged on the basis of the demurrage rules. The only notice given to the Terminal Company on the arrival of the car on the interchange was the receipt of the way-bill. In notifying a shipper that his car is spotted they usually go beyond that by advance notices of when it will arrive and they keep the shipper informed as to the car's movement when it arrives in the yard, and the approximate time it will be placed at its place of business. I think there was no difference between the billing that was handed to the Terminal Company in connection with

(Testimony of B. E. Palmer.)
these cars, and the billing handed the Terminal Company with reference to any other car interchanged to the Terminal Company for further carriage.

When the cars were unloaded at the oil sump the Terminal Company would be required to return the empties to the S. P. & S. at their designated interchange track at the Admiral Dock [82] about a mile away. At this point the Admiral Dock was located on the map, plaintiff's Exhibit 1, as being No. 43, being in close proximity to Terminal No. 1. When a car is delivered to a shipper, and the industry is located on the Terminal Company tracks, it would be necessary to interchange to the Terminal Company, and the Terminal Company would make the physical delivery of the car. If the industry was located on the S. P. & S. track it would be reversed —the Terminal Company would interchange to the S. P. & S. and the S. P. & S. would complete the delivery. When the Terminal Company delivers a shipment to a shipper we do not expect the shipper to transport the car from the place where we leave it to the place where he wants it unloaded. The rate contemplates a delivery to the industrial track of the shipper. In the case of a shipment consigned to a consignee at Portland, Oregon, we always take the means to find out where the consignee wants it to be delivered. I do not agree that all the directions are taken from the consignor without paying attention to the directions of the consignee. The

(Testimony of B. E. Palmer.)

billing really has no bearing on interchange or final delivery. The billing is merely a direction. The billing might say Chicago to Portland but that does not complete the transaction and after it reaches Portland we would endeavor to ascertain the desired destination or delivery point. After finding out the delivery point we would take the car to the place for that is part of the service.

The Terminal tariff is a switching tariff covering the movement from one industry within the terminal limits to another industry within the terminal limits and providing rates covering such service. [83]

The shipments involved in this case, from points on the S. P. & S., around Linnton, consigned to the Northern Pacific Railway Company, at Portland, Oregon, is brought in with the general interchange from the S. P. & S. It is interchanged at Guilds Lake at one of the designated interchange tracks. From there it would be switched out and handled by the Terminal Company to wherever the Northern Pacific wanted it. The fuel oil that the Northern Pacific Railway has used in its locomotives and which has been moving since January, 1933, goes over to the same oil track, goes into the same sump and into the same tank as that of the Terminal Company.

The Northern Pacific Railway engines are hostled down there at the roundhouse in Guilds Lake, and as the oil is taken out to fill the locomotive tanks

(Testimony of B. E. Palmer.)
of the Northern Pacific engines it is taken out indiscriminately from the tank and the amount furnished the Northern Pacific Railway's engines is charged to that company. The haul on the Northern Pacific Railway Company oil and the Terminal Company oil is practically identical except that the Terminal Company oil is hauling for itself and the Northern Pacific Railway Company's oil is hauled by the Terminal Company.

In accounting on the hauling of the Northern Pacific Railway Company oil for moving it from the interchange track to the oil spur the Northern Pacific Railway Company pays its proportion of the Terminal Company's operating cost as the total number of cars handled for that company bears to the total cars handled by the Terminal Company.

Referring to defendant's Exhibit "I" the Guilds Lake district and Guilds Lake yard is one thing. It consists of the switching tracks within the territory bounded by the [84] tracks upon which freight is received and switched. The make up and break up yard, the roundhouse, the tracks leading to it, the passenger yard to which all passenger cars are taken; also the repair shop, and the storage equipment, which I described as the passenger yard, and includes the whole railroad development down there in that district and covers an area of a little more than one hundred acres. The Guilds Lake district includes that and also certain industry tracks leading off from it. The development is shown on

(Testimony of B. E. Palmer.)
defendant's Exhibit "I". The word "Guilds Lake" is used interchangeably for the terminal, for the yard, and for the whole development.

It is also conceded by plaintiff's attorney that the S. P. & S. could not make delivery of the oil at the roundhouse; that to make such delivery it would be required to interchange the cars with the Terminal Company; that to make such delivery the S. P. & S. were compelled to transfer the cars to the Terminal Company.

CROSS EXAMINATION

By interchange I mean to say that one railroad turns a car over to another railroad to complete the transportation, that is called for by the bill of lading. A delivery to a shipper means that the last railroad that participates in the movement spots the car at the shipper's place of delivery. A delivery to a consignee, who happens to be a railroad company, is not necessarily any different than a delivery to an ordinary commercial shipper if it is to be delivered at a designated track. If it is to be delivered at a designated track on the connecting railroad's line the connecting railroad participates in the transportation. If you assume that a connecting railroad wants to take delivery at the point of interchange then it gets delivery just the same as it would an interchange. In these shipments that we have been [85] discussing that were billed to the Terminal Company at Guilds Lake, if the Terminal Company wanted these shipments to go on to the

(Testimony of B. E. Palmer.)

Union Depot, or wanted a shipment to go to the Union Depot for the use in the Depot building, the Terminal Company would have the billing reading from Willbridge to the Union Depot if it wanted to. In case the Terminal Company wanted a car of oil delivered to the Union Depot they could have it billed to the Union Depot and the rate between those two zones would apply, and in the case when the Terminal Company got the car at Guilds Lake that would be an interchange between the two connecting carriers, even though the Terminal Company is also the consignee.

"Q. But if the Terminal Company decided that it wanted to take delivery of that car at Guilds Lake, if they figured it would be a little cheaper, they could do so, and they the*y* could handle it in to the Union Depot with their own engine, in any way they liked, and then that would not be a part of transportation covered by the tariff, would it?

A. If they decided that, that is true.

Q. Yes.

COURT: In that event, no division of the rate would be made?

A. But I would consider that that would be a matter of decision.

COURT: It would be a matter in the option of the Terminal Company?

A. There should be some—there should be a decision of that effect made, and it should be clearly understood.

(Testimony of B. E. Palmer.)

Mr. HART: Yes. Now, if I may stop and explain to your Honor, we take the position that that sort of decision has to be made in advance of the shipment, and could not be made later.

Q. Mr. Palmer, say that a carrier like the Northern Pacific Terminal Company taking cars from the S. P. & S. cars of oil that are actually consigned to the Terminal Company, the Terminal Company in that situation can either take those cars as a consignee right there at that interchange, or they can take them as a connecting carrier for further transportation?

A. In answering that, I would have to assume that the Terminal Company was a party to this billing. Now, the Terminal Company had nothing to do with the billing. [86] The bills were made by the S. P. & S. Railroad. Now, the Terminal Company didn't know where they consigned it. There is no such agreement in existence.

COURT: Who directs how the bill of lading shall be made?

A. I just stated—

COURT: Is that the shipper, or consignee, or the carrier?

A. The shipper—I don't know—it was the originating carrier that makes the bills.

(Testimony of B. E. Palmer.)

The shipper does not make the bills. In this particular transaction I know that the bills of lading were made out on the forms of the shipper. The bill of lading is merely a direction of a movement of the car say from Seattle to Portland. The shipper or consignor has no right to say where that car shall be placed. Now if it was a car that was handled from say the Northern Pacific or the Union Pacific from Seattle, the final destination was on an industrial track on the S. P. & S. Railroad, the car would be brought to the west side of the river, interchanged to the S. P. & S. Railroad, and they would handle it to destination.

It is true that the Terminal Company has a right to take delivery at the first connecting point or instead it might provide for delivery at the final destination, and when possession changes at the interchange track of shipments belonging and actually consigned to the second carrier has the right to make that change of possession either an interchange or an actual delivery, I am now speaking of rights.

RE-DIRECT EXAMINATION

The Terminal Company never sold any of its oil to the Southern Pacific, or to any other person. They could not do that under their contract of purchase of the oil. *The* [87]

The Terminal Company never elected to receive delivery, or notify the S. P. & S. that it elected to receive delivery, of this oil at the interchange track.

(Testimony of B. E. Palmer.)
Its only notification to the S. P. & S. of receiving business at that track was its designation of the track as a receiving track for the interchange of business from the S. P. & S. That is, a general designation of that track as the receiving track for interchange business. If the interchange track, designated by the Terminal Company for interchange business, had been outside of Guilds Lake and the bill of lading read exactly as it is framed in these cases, the shipments could not have been put, by the S. P. & S. on the track at Guilds Lake, because they had no rights in Guilds Lake track at, and their only right there is to put cars there for delivery in interchange.

RECROSS EXAMINATION

When the Terminal Company took possession of these shipments that were billed to the Terminal Company at Guilds Lake at the interchange track the Terminal Company had complete and absolute control over them and was responsible for them under the car service rules, and if we wanted to send that car anywhere we liked we could do it without accounting to the S. P. & S. We could not have sold any one of those cars to any body else on account of our contract with the oil company, and we would not have had the legal right to have sold it to somebody else. The S. P. & S. had nothing to do with those contracts of purchase and we would have no legal right to use any oil except for the

(Testimony of B. E. Palmer.)

purpose we bought it for because of our contract of purchase.

The oil was consigned for a definite purpose, and that was for use in the Northern Pacific Terminal Company's engines. There was nothing in the bill of lading to show that. If we [88] had bought the oil for the purpose of speculating it is possible that instead of taking it to the sump we could have taken it up to the Admiral Dock, or any place else and drained it into another car if we had wanted to.

Is is thereupon stipulated that the contract of purchase of the fuel oil between the Northern Pacific Terminal Company and the Standard Oil Company, covering a period from February 1, 1923, to January 6, 1930, covering the oil involved in this case provided that the oil was sold by the Standard Oil Company to the Northern Pacific Terminal Company, f.o.b. Fuel Oil Spur, Guilds Lake, Portland, within switching Zone 5, and that the roundhouse is in Zone 5.

C. B. SHIBELL

was called as a witness on behalf of the defendant and testified as follows:

I have been comptroller of Northern Pacific Terminal Company since 1927. I have been employed in the office of the comptroller since 1915. During that period I was in charge of the accounts of the Terminal Company. I had some correspondence with

(Testimony of C. B. Shibell.)

the comptroller of the S. P. & S. with reference to the claim of the Terminal Company that it was entitled to a part of the revenue accruing on oil shipments on lines of the S. P. & S. to the Terminal Company, and consigned to the Terminal Company. I took the matter up first in 1926. The accounting department handled the matter very poorly in not having taken it up earlier. [89]

During the period from 1923 and ending December 31, 1929, the Standard Oil Company was paying the freight charges to the S. P. & S. In our accounting the originating carrier reports the freight charges and when the freight is prepaid collects the money and it was the responsibility of the S. P. & S. to make the accounting to the Terminal Company. The S. P. & S. made the switching settlement statements showing the retention of all the revenue and in 1926 the Terminal Company called the attention of the S. P. & S. to the fact that it was not giving the Terminal Company what they were entitled to, and that it was our opinion that the Terminal Company should participate in the division of the revenue.

The answer to our letter was Mr. Pickard's letter in which he said it would be a form of rebating if the S. P. & S. divided the switching revenue. These letters are already in evidence.

Thereupon there was offered and received in evidence as defendant's Exhibit "J", a letter of C. B. Shibell, Comptroller of the N. P. Terminal Com-

(Testimony of C. B. Shibell.)

pany, to S. F. Parr, Agent of the S. P. & S. Railway, dated March 20, 1930, the answer of Robert Crosbie, Comptroller of the S. P. & S. to C. B. Shibell, dated March 29, 1930, a letter of C. B. Shibell [90] to Robert Crosbie, Comptroller of the S. P. & S. dated April 1, 1930, and a letter of Robert Crosbie, to C. B. Shibell, dated April 18, 1930, which letters are as follows:

Portland, Oregon, March 20, 1930.

Mr. S. F. Parr, Agt.,
S. P. & S. Ry. Co.
Linnton, Oregon

Dear Sir:

Wish to call your attention to the fact that you have been billing the Northern Pacific Terminal Co. in the amount of $11.50 per car on fuel oil, the rate applicable on cars moving from Zone 5 to Zone 1.

This rate is incorrect. The N. P. Terminal Co. plant, where this fuel oil is unloaded, is located at Guilds Lake Yard in Zone 5 and the rate of $8.55, applicable to an exclusive zone 5 switch movement should be charged, with an equal division of the revenue between the N. P. T. Co. and the S. P. & S. Ry. Co.

Will you please acknowledge receipt of this letter and advise when an adjustment will be made on the freight bills which we have paid to the S. P. & S. at Linnton, where the incorrect

(Testimony of C. B. Shibell.)

rate was applied? Your assumption that our Guild's Lake plant was located in Zone 1 is incorrect. It is located in Zone 5.

Yours truly,
(Sgd) C. B. Shibell,
Comptroller.

March 29, 1930

Mr. C. B. Shibell, Comptroller
Northern Pacific Terminal Company,
Portland, Oregon

Dear Sir:

SWITCHING CHARGES ON FUEL OIL FOR NORTHERN PACIFIC TERMINAL COMPANY

Referring to your letter of March 20th, file C 201, to agent at Linnton, in regard to charges billed you on shipments of your fuel oil to Portland where you have been billed a Zone 5 to Zone 1 charge of $11.50 per car instead of the Zone 5 rate of $8.55; [91]

It is our understanding that these shipments are billed to connection with your line at Guild's Lake and should be handled on S. P. & S. local switching settlement statements, your line not participating in the haul. Charges should, therefore, be adjusted to $8.55 per car which amount should accrue to the S. P. & S. As settlement has been made allowing your line $5.75 per car

(Testimony of C. B. Shibell.)

out of the revenue, adjustment should now be made reducing the charges to $8.55 per car which amount would accrue to the S. P. & S. making a balance in favor of the S. P. & S. of $2.80 per car.

Please advise if you will accept our bill for adjustment on this basis or do you prefer to handle thru agents account. We believe that adjustment could be expedited, with the lease inconvenience to all concerned, if handled thru audit bill instead of thru the agents' account.

(Sgd) Robt. Crosbie,
Comptroller.

April 1, 1930.

Mr. Robert Crosbie, Comptroller,
Spokane, Portland & Seattle Railway Co.
Portland, Oregon

Dear Sir:

I have your letter dated March 29, 1930, file TR 382-N, relative to accounting for revenue assessed under the Zone Tariff, on fuel oil moving from Linnton to the Northern Pacific Terminal Company.

These cars of oil are billed to the Northern Pacific Terminal Company at a rate of $8.55 per car, which covers the placement of the load at the industry, and not only to a connecting line, as stated in your letter. Terminal Com-

(Testimony of C. B. Shibell.)

pany power completes the delivery from setout track to the industry, which in this instance, is the Northern Pacific Terminal Company, fuel track, and the $8.55 in the published tariff is not earned until placement on our fuel track is made. In accordance with published tariff, the $8.55 should be divided between the carriers participating in the haul, and therefore, you should report to us 50% of the $8.55 as the line completing the delivery.

Yours truly,
Original signed by C. B. Shibell,
Comptroller.

Cc—John Miesbus,
General Yardmaster
Dict. CSB:JH [92]

April 18, 1930.

Mr. C. B. Shibell, Comptroller,
The Northern Pacific Terminal Company,
Portland, Oregon.

Dear Sir:

SWITCHING CHARGES ON FUEL OIL FOR NORTHERN PACIFIC TERMINAL CO.

Replying to your letter of April 1st, File C 141, in regard to division of switching revenue on shipments of fuel oil consigned to the Northern Pacific Terminal Company:

(Testimony of C. B. Shibell.)

If delivery of oil shipments to connections with your track does not complete the movement and the movement from such connections to unloading points involves an additional haul by the Northern Pacific Terminal Company, you will be entitled to 50% of the switching charge.

You have been charged $11.50 on a number of these shipments out of which your line has received $5.75 whereas the correct charges are $8.55 out of which your line received $4.28. This leaves an overcharge of $2.95 per car of which $1.47 is due from your line leaving a net amount due of $1.47 per car.

Please advise if you will render audit bill against us to adjust these items or do you prefer to have it handled thru the Agent's accounts by corrections on the switching settlement statements.

Yours truly,

ROBT. CROSBIE.

HS J

CROSS EXAMINATION

My predecessor was E. L. Brown, who was the comptroller of the Terminal Company for about fifty years. I do not blame Mr. Brown but rather myself as handling this matter rather poorly because I was in active charge of the accounting at

(Testimony of C. B. Shibell.)

the time. Up until 1926 we rather passed the explanation of Mr. Pickard with regard to the division of the switching revenue. The S. P. & S. having declined our demand of 1926 we did nothing about it until 1930. The movement continued from Willbridge right through until 1930 and we continued to accept the accounting of the S. P. & S. in the meantime. In 1930 we reiterated [93] our former position that we should participate in the revenue. The matter was brought up next by the Terminal Company's comptroller by letter of April 1, 1932. I recall of no voluntary division on the part of the S. P. & S. without some written request on the part of the Terminal Company.

It was stipulated that between February 1, 1923, and April 25th, 1926, there was transported in the movement involved in this case, and for which defendant claims to be entitled to one half the charge, 993 cars of oil, and that the total transportation charge therefor was the sum of $8,490.15; that from April 26, 1926, to the 31st day of December, 1929, 1309 cars on which the total transportation charge was $11,191.95, and on which there had been paid to the defendant the sum of $1,222.65; that from the 1st day of January, 1930, to the 28th day of March, 1932, there was transported 744 cars on which the total transportation charges collected was the sum of $6,436.01, and that there has been paid to the defendant the sum of $3,215.91.

Thereupon defendant rested.

Thereupon, and before the submission of said cause to said court, the defendant requested the court to make rulings on certain questions of law, which said requests, together with the ruling of the court, and the allowance of exceptions to the ruling of the court were as follows: [94]

(1) Whether or not in connection with the transportation of company material, consigned to a common carrier, where the receiving carrier and the consignee carrier have entered into joint tariffs providing rates from points on the initial carrier to points on the consignee carrier, it is as a matter of law necessary that the bill of lading shall specify the particular track upon the line of the consignee carrier at which such shipment is to be delivered where the junction point of the lines of the two carriers and the track of the consignee carrier on which said shipment is to be delivered, are both within the district as shown as the destination of said shipment and the track on which delivery was made and intended to be made at the time of the delivery of the shipment to the initial carrier cannot be reached by the line of the initial carrier, and where the initial carrier at the time of receiving the shipment had knowledge of the particular track on which said shipment was intended to be made and at which it was actually made.

The above request by defendant was overruled and denied, to which ruling of the Court the defendant excepted and its exception is allowed and noted.

(2). Whether or not it was the duty of the initial carrier, on receiving a shipment of company material, consigned to a connecting consignee carrier, and by the joint tariffs of the two carriers the same rate applies not only to the point of junction of the two carriers, but to other points on the line of the consignee carrier at which delivery could not be made by the initial carrier to require definite instructions as to the actual track at which delivery is to be made, and insert the same in the bill of lading issued for said shipment by the initial carrier, or to require specific instructions as to the track of delivery [95] and see that proper instructions are given for such delivery where the junction point of the lines of the two carriers and the track of delivery are both within the description of the destination as actually inserted in the bill of lading issued by the initial carrier.

The above request by defendant was overruled and denied, to which ruling of the Court the defendant excepted and its exception is allowed and noted.

(3). That the Court rule as a matter of law in this case what statute of limitations applies, towit: whether the claimed contract of limitations of three years or the state statute of six years.

The above request by defendant was overruled and denied, to which ruling of the Court the defendant excepted and its exception is allowed and noted.

In addition to the foregoing request for rulings as a matter of law the defendant calls attention to

the fact that a counterclaim has been set up by the defendant and in the reply plaintiff set up two periods of limitations, one a so-called contract limitation, and the other, the six year limitation period of the state statute, and defendant requests that testimony with reference to the character of the accounts between the plaintiff and defendant be taken so as to determine whether or not the account between the parties was not an open mutual current account, and further testimony as to whether or not either the so-called contract limitations or the state statute of limitations applies in this case.

The above request of defendant was overruled and denied, to which ruling of the Court the defendant excepted and its ex- [96] ception is allowed and noted.

The above requests by defendant for rulings on matters of law are and each of them is hereby separately denied and disallowed. To the refusal of the Court to allow each of said requests the defendant excepted and its exception was allowed as to each of such requests and is hereby noted.

(S) JOHN H. McNARY
District Judge

Thereupon, and before the submission of said cause to the court, the defendant requested of the Court the making of certain Findings of Fact and Conclusions of law, which said request, together with the rulings of the court thereon, and the exceptions to such rulings, were in words and figures as follows:

I.

That both the plaintiff and the defendant are common carriers of freight and own lines of railroad within the switching territory known as the Portland Switching District.

II.

That the tracks of said companies connect at various points within the switching district and there is a connection between said tracks at what is known as Guilds Lake.

III.

That the plaintiff has no tracks except its through running tracks at Guilds Lake, but the defendant has a large yard and plant at said point consisting of make-up and break-up yards, coach yards, supply yards, repair plant and a roundhouse and hostling plant; that the make-up and break-up yard is adjacent to the through tracks operated over by the S. P. & S. and defendant has designated a track in the make-up and break-up yard as a transfer [97] track on business received by it from the plaintiff, but said plaintiff has no right to go upon said tracks for any purpose, except to transfer business to the defendant for further transportation.

IV.

At the roundhouse is an oil tank for the storage of fuel oil owned and operated by the defendant at which point are facilities for the unloading of oil and the storage thereof.

V.

That the plaintiff has no trackage and no right to make deliveries at said roundhouse or oil storage tank or spur adjacent to such tank, and there are no facilities for the unloading of oil at the transfer track in the make-up and break-up yard at Guilds Lake; that the distance from said transfer track in the break-up yard to the oil spur adjacent to the oil storage track at Guilds Lake is approximately three-quarters of a mile to one mile.

VI.

That prior to the transportation of the shipments of oil involved in this case plaintiff and defendant, together with other carriers having tracks within the Portland Switching District entered into joint tariffs, published and filed the same with the Interstate Commerce Commission, and with the Public Utility Commission, or its successors, Public Utilities Commissioner of the State of Oregon governing switching rates applicable from points within the said Portland Switching District on the line of one of said carriers for delivery at points on the tracks of another of such carriers, and said rates were fully established and have been in effect at all times during [98] the transportation of the oil in question in this case.

VII.

That both the point of origin of the shipments involved in this case and all tracks within what is

designated as Guilds Lake or Guilds Lake District were within the same zone and the tariff so established and filed provided at all times a rate of $8.55 per car, applicable to all the shipments involved, up to the 2nd day of January, 1932, and thereafter a rate of $9.40 per car on all shipments involved, transported on and after said January 2, 1932.

VIII.

That by separate agreement between the parties to said switching tariff it was agreed that the rate applicable upon any shipments should be divided equally between the number of carriers participating in the transportation service and that when two carriers participated the revenue accruing from said shipment would be divided equally between them.

IX.

That on or about the 1st day of February, 1923, up to and including the 6th day of January, 1930, the defendant was receiving its fuel oil from the Standard Oil Company, whose oil plant is located at Willbridge on the line of the plaintiff; that the contracts for the sale of said oil provided that the oil was sold to the defendant for locomotive fuel oil purposes and was to be delivered f. o. b. in tank car lots at the oil spur of the defendant at Guilds Lake, or that it was to be delivered f. o. b. at the defendant's oil spur in Zone 5; that each and all of the shipments up to and including Jan- [99]

uary 6, 1930, consisted of oil sold to the defendant under said contracts.

X.

That all shipments involved herein subsequent to the 6th day of January, 1930, were sold to the defendant under contracts providing that the same were sold f. o. b. the seller's plant at Linnton.

XI.

That on each of said shipments involved in this case the bills of lading were entered into by and between the plaintiff and the seller of said oil and the consignee was designated as the Northern Pacific Terminal Company, Guilds Lake, or Guilds Lake, Portland, Oregon, and the routing designated in said bills of lading were "S. P. & S.—N. P. T.", which initials indicated Spokane, Portland & Seattle and the Northern Pacific Terminal Company.

XII.

That each and all of said shipments were transported by the S. P. & S. to the transfer track at the make-up and break-up yard of the defendant at Guilds Lake and were taken out of the transfer train and transported by the defendant from said transfer track to the oil spur at the oil storage tank in the vicinity of the roundhouse, which point is also in Guilds Lake.

XIII.

That the total number of cars so transported from the 1st day of February, 1923, to the 25th day

of April, 1926, was 993 cars, and the total revenue collected was $8,490.15, no part of which was paid to the defendant. [100]

XIV.

That the total number of cars so transported from the 26th day of April, 1926, to the 31st day of December, 1929, was 1309 cars, on which there was collected a total of $11,191.95 as freight charges, no part of which was paid to the defendant, except the sum of $1,222.65.

XV.

That the total number of cars so transported from January 1, 1930, to March 28, 1932, was 744 cars, of which the transportation charges collected was $6,436.01, no part of which has been paid to the defendant, except the sum of $3,215.91.

XVI.

That at all times from and after the 26th day of August, 1926, the plaintiff has had full knowledge that each and all of said shipments were destined when shipped to the oil spur of the defendant at the storage tank in Guilds Lake. [101]

The defendant requests the Court to make the following

CONCLUSIONS OF LAW

I.

That the defendant had the right to participate in the rate charged for materials consigned to it

where the transportation service extended beyond the junction of the tracks of the plaintiff and defendant.

II.

That it was the primary duty of the plaintiff, on accepting the shipment, to see either that the bill of lading designated the proper destination or to secure sufficient information to make definite the destination to which such shipments were to be carried.

III.

That the bills of lading issued in this case were sufficient to show that the transportation service extended onto the line of the defendant.

IV.

That irrespective of the sufficiency of the bill of lading the plaintiff had at all times since August 26, 1926, knowledge of where the shipments were destined and to which they were actually transported, and any failure to designate said destination in said bill of lading, if the same was required, was its fault.

V.

That with knowledge of the actual track to which said shipments were to be delivered it was not necessary that it should [102] be specifically designated in the bill of lading.

VI.

That the defendant participated as a common carrier in each and all of said shipments and is entitled to recover one-half the amount collected by plaintiff as transportation charges and not heretofore paid.

VII.

That the defendant is entitled to recover of and from the plaintiff as its division of the switching charges paid on said shipments, the following amounts, to wit: the sum of $4,245.07 from the 1st day of February, 1923, to and including the 25th day of April, 1926, and the further sum of $4,984.65 for the period April 26, 1926 to and including the 1st day of January, 1930, and the further sum of $2.09 for the period subsequent to January 6, 1930.

VIII.

That the plaintiff is not entitled to recover any sum of and from the defendant.

IX.

That the defendant is entitled to recover its costs and disbursements incurred herein against the plaintiff.

....

District Judge

The foregoing request for Findings of Fact and Conclusions of law was presented to this court with the request by defendant that each and all of said

Findings and Conclusions of Law be made by the Court before the submission of said cause to the Court for decision, [103]

IT IS ORDERED AND ADJUDGED that the foregoing proposed Findings of Fact I and II are hereby denied, on the ground and for the reason that the facts therein proposed to be found are covered by the Findings of Fact presented by the plaintiff and contemporaneously with this order being signed.

IT IS FURTHER ORDERED AND ADJUDGED, that the foregoing proposed Findings of Fact requested by defendant, numbered III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV and XVI, be and each of said Findings is separately denied and disallowed, to which denial and refusal to so find, and to each thereof, the defendant excepted, and said exceptions, and an exception to each of said refusal to so find is hereby allowed and noted by the Court.

IT IS FURTHER ORDERED and ADJUDGED that the foregoing Conclusions of law requested by defendant, numbered I, II, III, IV, V, VI, VII, VIII and IX be and each thereof is hereby denied and disallowed, and to the refusal of the Court to make each of said Conclusions so requested by the defendant separately and to each such request the defendant excepted and the Court allowed an exception to the defendant as to each of

such Conclusions so requested and said exceptions and each thereof are hereby noted.

(S) JOHN H. McNARY
District Judge [104]

Thereupon, and before the submission of said cause, the defendant requested of the court, and moved for a judgment in favor of the defendant, which judgment, so requested in favor of the defendant, and the ruling of the court, and the exception thereto, is in words and figures as follows:

The above entitled action, having been duly tried, and Findings of Fact and Conclusions of Law having been duly made and entered, determining that the plaintiff is not entitled to judgment against the defendant in any sum whatever, but that defendant is entitled on its counterclaim to judgment against the plaintiff in the sum of $4,245.07 on all shipments from the 1st day of January, 1923, to and including the 25th day of April, 1926, and the further sum of $4,984.65 for all shipments from and inclusive of April 26, 1926, to and including the 1st day of January, 1930, and the further sum of $2.09 for the period subsequent to January 6, 1930,

IT IS THEREFORE ORDERED AND ADJUDGED that the defendant have and recover of and from plaintiff the sum of $4,245.07, together with interest thereon at the rate of six per cent per annum from the 25th day of April, 1926, and the further sum of $4,984.65, together with interest thereon at the rate of six per cent per annum from

the 1st day of January, 1930, and the further sum of $2.09 with interest thereon at the rate of six per cent per annum from March 2, 1932, and that the defendant have and recover of [105] and for the plaintiff its costs and disbursements incurred herein, taxed and allowed in the sum of $............

Dated this .... day of October, 1934.

....

District Judge

Judgment in favor of the defendant in words and figures as above set out was, prior to the submission of said cause, presented to said Court, and a motion submitted by the defendant that the said judgment in said terms be granted,

IT IS HEREBY ORDERED AND ADJUDGED that said request and said motion be and the same are hereby denied, to the refusal to allow said request and said motion the defendant excepted and its exception was and is hereby allowed and noted.

JOHN H. McNARY

District Judge.

That prior to the submission of said cause the plaintiff requested Findings of Fact and Conclusions of Law and Judgment in its favor, which said Findings of Fact and Conclusions of Law and Judgment are in words as finally allowed and signed by the court and as contained in the transcript to be filed herein. Before the allowance and the signing thereof the defendant submitted to the Court

objections to said proposed Findings of Fact and Conclusions of Law, which said objections and the ruling of the Court thereon, and the exceptions allowed, are in words and figures as follows: [106]

I.

Defendant objects to plaintiff's requested Finding of Fact III, and particularly that portion which reads, "all of said carload shipments of fuel oil were duly transported by plaintiff to Guilds Lake in accordance with bills of lading issued to cover said shipment and at Guilds Lake were delivered to defendant," on the ground and for the reason that the same is not supported by the evidence, that the undisputed evidence conclusively shows that plaintiff had no right to make deliveries of shipments at Guilds Lake or to go upon the tracks of defendant at said point, except for the purpose of making transfers of shipments to the defendant for further transportation to final destination of said shipments; and on the further ground that the bills of lading show, by naming the defendant as one of the carriers over whose lines said shipments were to be routed, that said defendant was to participate in the common carrier service in transporting said shipments to the destination thereof; on the further ground that the undisputed evidence shows that plaintiff at all times knew, and particularly from and after August 26, 1926, knew that each and all of said shipments were destined to and were in fact transported to and delivered at the oil spur

adjacent to the oil storage tank in the neighborhood of the roundhouse of defendant at Guilds Lake, and approximately three-quarters to one mile from the point where plaintiff claims to have delivered said shipments to defendant; and on the further ground that the undisputed evidence conclusively shows that at the time of the receipt of said shipments by plaintiff the same were intended to be and known by the plaintiff to be intended for transportation to said oil spur at said oil storage tank in Guilds Lake, and were in fact so transported by defendant to said oil spur. [107]

The above objection was overruled and denied by the Court, to which action of the Court defendant excepted and its exception allowed by the Court.

II.

Defendant objects to plaintiff's requested Finding of Fact V, and particularly that portion which reads, "all of said carload shipments of fuel oil were duly transported by plaintiff to Guilds Lake in accordance with bills of lading issued to cover said shipment and at Guilds Lake were delivered to defendant," on the ground and for the reason that the same is not supported by the evidence, that the undisputed evidence conclusively shows that plaintiff had no right to make deliveries of shipments at Guilds Lake or to go upon the tracks of defendant at said point, except for the purpose of making transfers of shipments to the defendant for further transportation to final destination of said ship-

ments; and on the further ground that the bills of lading show, by naming the defendant as one of the carriers over whose lines said shipments were to be routed, that said defendant was to participate in the common carrier service in transporting said shipments to the destination thereof; on the further ground that the undisputed evidence show that plaintiff at all times knew, and particularly from and after August 26, 1926, knew that each and all of said shipments were destined to and were in fact transported to and delivered at the oil spur adjacent to the oil storage tank in the neighborhood of the roundhouse of defendant at Guilds Lake, and approximately three-quarters to one mile from the point where the plaintiff claims to have delivered said shipments to defendant; and on the further ground that the undisputed evidence conclusively shows that at the time of the receipt of said shipments by plaintiff the same were intended to be and known by the plaintiff to be intended for transportation to said oil spur at said oil storage tank in Guilds [108] Lake, and were in fact so transported by defendant to said oil spur.

The above objection was overruled and denied by the Court, to which action of the Court defendant excepted and its exception allowed by the Court.

III.

Defendant objects to plaintiff's requested Finding of Fact VII, and particularly that portion which reads, "all of said carload shipments of fuel

oil were duly transported by plaintiff to Guilds Lake in accordance with bills of lading issued to cover said shipment and at Guilds Lake were delivered to defendant'', on the ground and for the reason that the same is not supported by the evidence, that the undisputed evidence conclusively shows that plaintiff had no right to make deliveries of shipments at Guilds Lake or to go upon the tracks of defendant at said point, except for the purpose of making transfers of shipments to the defendant for further transportation to final destination of said shipments; and on the further ground that the bills of lading show, by naming the defendant as one of the carriers over whose lines said shipments were to be routed, that said defendant was to participate in the common carrier service in transporting said shipments to the destination thereof; on the further ground that the undisputed evidence shows that plaintiff at all times knew, and particularly from and after August 26, 1926, knew that each and all of said shipments were destined to and were in fact transported to and delivered at the oil spur adjacent to the oil storage tank in the neighborhood of the roundhouse of defendant at Guilds Lake, and approximately three-quarters to one mile from the point where plaintiff claims to have delivered said shipments to defendant; and on the further ground that the undisputed evidence conclusively shows that at the time of the receipt of said shipments by plaintiff the same [109] were intended to be and known by the

plaintiff to be intended for transportation to said oil spur at said oil storage tank in Guilds Lake, and were in fact so transported by defendant to said oil spur.

The above objection was overruled and denied by the Court, to which action of the Court defendant excepted and its exception allowed by the Court.

IV.

Defendant objects to Finding of Fact IX requested by plaintiff, on the ground that it is not supported by the evidence and that the undisputed evidence conclusively shows that defendant performed part of the transportation service in accomplishing the carriage of said shipments to their destination and that plaintiff was entitled only to a division of one-half of the transportation charge for said shipments instead of the whole thereof as claimed in said requested finding.

The above objection was overruled and denied by the Court, to which action of the Court defendant excepted and its exception allowed by the Court.

V.

Defendant objects to Finding of Fact X requested by the plaintiff on the ground and for the reason that it is not supported by the evidence in that the undisputed evidence conclusively shows that defendant was a participating carrier in the transportation of each and all of said shipments, and that defendant was entitled to one-half the trans-

portation charge on said shipments, and that plaintiff made no error or mistake in the allowance and payment to defendant of one-half said charge on said shipments on which defendant received or retained one-half of said charge and that plaintiff is not entitled to said [110] sum of $4,440.22, or any sum whatever, but that defendant is entitled to one-half of the charge on all shipments theretofore made on which one-half the charge has not been paid by plaintiff to defendant.

The above objection was overruled and denied by the Court, to which action of the Court defendant excepted and its exception allowed by the Court.

VI.

Defendant objects to the Conclusion of Law requested by plaintiff on the ground that the same is not supported by the evidence and that the undisputed evidence conclusively shows that there is no sum due from defendant to plaintiff, but that plaintiff is indebted to defendant for large sums, to wit: one-half of all transportation charges on shipments of said fuel oil heretofore made and not heretofore paid by plaintiff to defendant.

The above objection was overruled and denied by the Court, to which action of the Court defendant excepted and its exception allowed by the Court.

WILSON & REILLY
Attorneys for Defendant [111]

The above entitled objections to the proposed Findings requested by plaintiff were made prior to

the submission of said cause to the Court, and the same and each thereof, is separately overruled and denied, to which ruling of the Court, with reference to each of said objections, the defendant excepted separately and its exceptions was in each instance allowed and is hereby allowed by the Court, and said exceptions are each hereby noted.

(S) JOHN H. McNARY
District Judge

Thereafter the Court signed the Findings of Fact and Conclusions of Law requested by the plaintiff and entered judgment thereon in favor of the plaintiff and against the defendant in words and figures as requested by the plaintiff. [112]

The foregoing Bill of Exceptions having been presented to the court on the 22nd day of November, 1934, within the time allowed by order of the court herein to present the same, and the time of objecting thereto having expired, and no objections having been filed thereto, the said Bill of Exceptions is hereby settled and certified to contain a full, true and correct record of all of the evidence and exhibits offered and received in the trial of said cause, except Plaintiff's Exhibit "1" and Defendant's Exhibit "I", which said Exhibits are attached to this Bill of Exceptions and identified and made a part of this Bill of Exceptions.

I further certify that said Bill of Exceptions contains all of the Defendant's Requests for Rulings on Matters of Law, Defendant's Request for

Findings of Fact and Conclusions of Law, Defendant's Objections to the Findings of Fact and Conclusions of Law and Judgment requested by plaintiff, together with the Rulings of the Court thereon, and the exceptions of the Defendant to the Rulings of the Court on said Requests and the Findings of Fact and Conclusions and Judgment entered in said cause.

Done and dated this 11th day of December, 1934.

JOHN H. McNARY

Judge of the District Court of the United States for the District of Oregon.

[Endorsed]: Filed December 11, 1934. [113]

AND AFTERWARDS, to wit, on the 15th day of January, 1935, there was duly FILED in said Court, a PETITION FOR APPEAL, in words and figures as follows, to wit: [114]

[Title of Court and Cause.]

PETITION FOR APPEAL

Petitioner, The Northern Pacific Terminal Company of Oregon, a corporation, defendant herein, conceiving itself aggrieved by the judgment made and entered on the 30th day of October, 1934, in the above entitled Court and cause, wherein it was adjudged that the Spokane, Portland and Seattle Railway Company, a corporation, plaintiff above named, have and recover judgment against The

Northern Pacific Terminal Company, a corporation, defendant above named, in the sum of $4,440.22, together with interest at the rate of 6% per annum from April 26, 1932, amounting to the sum of $635.20, and with costs and disbursements taxed therein in the sum of $26.00, does hereby appeal from said judgment, and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, and petitioner files herewith its Assignment of Errors asserted and relied upon by it upon its said appeal; said petitioner prays that its said appeal may be allowed, that citation issue herein as provided by law, and that an order be entered herein fixing the amount of the bond to be given by petitioner upon such appeal, the same to act both as a cost bond and as a supersedeas, and that a transcript of the [115] record, proceedings and papers upon which said judgment was made and entered, be duly authenticated and sent to the United States Circuit Court of Appeals for the Ninth Circuit.

THE NORTHERN PACIFIC TERMINAL
COMPANY OF OREGON
By JAMES G. WILSON
JOHN F. REILLY
Its Attorneys.

Due service of the foregoing Petition for Appeal and the receipt of a true copy thereof, duly certified to be such by James G. Wilson, one of the de-

fendant's attorneys, is hereby admitted at Portland, Oregon, this 15th day of January, 1935.

C. A. HART
Of Attorneys for Plaintiff.

[Endorsed]: Filed January 15, 1935. [116]

AND AFTERWARDS, to wit, on the 15th day of January, 1935, there was duly FILED in said Court, an ASSIGNMENT OF ERRORS in words and figures as follows, to wit: [117]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

The Northern Pacific Terminal Company of Oregon, defendant above named, complains of the final judgment made and entered in the above entitled cause, on the 30th day of October, 1934, and says that in the proceedings in said cause, and in said final judgment, manifest error has occurred to the prejudice of said defendant, of which it makes the following

ASSIGNMENT OF ERRORS

on which it will rely in the appeal from said judgment.

I.

The Court erred in overruling and denying defendant's request numbered I of request for rulings on questions of law claimed by defendant to be involved in this case.

II.

The Court erred in overruling and denying defendant's request numbered II of request for rulings on questions of law claimed to be involved in this case. [118]

III.

The Court erred in overruling and denying defendant's request numbered III of request for rulings on questions of law claimed to be involved in this case.

IV.

The Court erred in overruling and denying defendant's request that additional testimony be taken with reference to the character of accounts between the plaintiff and the defendant so as to determine whether or not the same was an open, mutual, current account and the limitation to be applied thereto.

V.

The Court erred in denying and refusing to find Finding of Fact numbered III requested by defendant as the same is sustained by the undisputed evidence received in said cause.

VI.

The Court erred in denying and refusing to find Finding of Fact numbered IV requested by defendant as the same is sustained by the undisputed evidence received in said cause.

VII.

The Court erred in denying and refusing to find Finding of Fact numbered V requested by defendant as the same is sustained by the undisputed evidence received in said cause.

VIII.

The Court erred in denying and refusing to find Finding of Fact numbered VI requested by defendant as the same is sustained by the undisputed evidence received in said cause. [119]

IX.

The Court erred in denying and refusing to find Finding of Fact numbered VII requested by defendant as the same is sustained by the undisputed evidence received in said cause.

X.

The Court erred in denying and refusing to find Finding of Fact numbered VIII requested by defendant as the same is sustained by the undisputed evidence received in said cause.

XI.

The Court erred in denying and refusing to find Finding of Fact numbered IX requested by defendant as the same is sustained by the undisputed evidence in said cause.

XII.

The Court erred in denying and refusing to find Finding of Fact numbered X requested by de-

fendant as the same is sustained by the undisputed evidence received in said cause.

XIII.

The Court erred in denying and refusing to find Finding of Fact numbered XI requested by defendant as the same is sustained by the undisputed evidence received in said cause.

XIV.

The Court erred in denying and refusing to find Finding of Fact numbered XII requested by defendant as the same is sustained by the undisputed evidence received in said cause.

XV.

The Court erred in denying and refusing to find [120] Finding of Fact numbered XIII requested by defendant as the same is sustained by the undisputed evidence received in said cause.

XVI.

The Court erred in denying and refusing to find Finding of Fact numbered XIV requested by defendant as the same is sustained by the undisputed evidence received in said cause.

XVII.

The Court erred in denying and refusing to find Finding of Fact numbered XV requested by defendant as the same is sustained by the undisputed evidence received in said cause.

XVIII.

The Court erred in denying and refusing to find Finding of Fact numbered XVI requested by defendant as the same is sustained by the undisputed evidence received in said cause.

XIX.

The Court erred in refusing to make and find Conclusion of Law numbered I requested by the defendant.

XX.

The Court erred in refusing to make and find Conclusion of Law numbered II requested by the defendant.

XXI.

The Court erred in refusing to make and find Conclusion of Law numbered III requested by the defendant.

XXII.

The Court erred in refusing to make and find Conclusion of Law numbered IV requested by the defendant. [121]

XXIII.

The Court erred in refusing to make and find Conclusion of Law numbered V requested by the defendant.

XXIV.

The Court erred in refusing to make and find Conclusion of Law numbered VI requested by the defendant.

XXV.

The Court erred in refusing to make and find Conclusion of Law numbered VII requested by the defendant.

XXVI.

The Court erred in refusing to make and find Conclusion of Law numbered VIII requested by the defendant.

XXVII.

The Court erred in refusing to make and find Conclusion of Law numbered IX requested by the defendant.

XXVIII.

The Court erred in denying the motion and request of defendant that the Court give judgment in favor of the defendant to the effect that the plaintiff take nothing by its complaint and that the defendant have and recover of and from the plaintiff the sum of $4,245.07, together with interest thereon at the rate of 6% per annum from the 25th day of April, 1926, and the further sum of $4,984.65, together with interest thereon at the rate of 6% per annum from the 1st day of January, 1930, and the further sum of $2.09, with interest thereon at

the rate of 6% per annum from March 28, 1932, and that the defendant have and recover from the plaintiff its costs and disbursements to be fixed and allowed in said cause.

XXIX.

The Court erred in overruling and denying defendant's [122] objection to plaintiff's requested Finding of Fact numbered III and in thereafter making and finding said Findings of Fact.

XXX.

The Court erred in overruling and denying defendant's objection to plaintiff's requested Finding of Fact numbered V and in thereafter making and finding said Findings of Fact.

XXXI.

The Court erred in overruling and denying defendant's objection to plaintiff's requested Finding of Fact numbered VII and in thereafter making and finding said Findings of Fact.

XXXII.

The Court erred in overruling and denying defendant's objection to plaintiff's requested Finding of Fact numbered IX and in thereafter making and finding said Findings of Fact.

XXXIII.

The Court erred in overruling and denying defendant's objection to plaintiff's requested Finding

of Fact numbered X and in thereafter making and finding said Findings of Fact.

XXXIV.

The Court erred in overruling and denying defendant's objection to Conclusion of Law requested by the plaintiff and in thereafter making and signing said Conclusion of Law.

XXXV.

The Court erred in giving judgment in said cause in favor of the plaintiff and against the defendant in the sum of $4,440.22, together with interest thereon at the rate of 6% per annum from the 26th day of April, 1932, amounting to the sum of $635.20, and in adjudging to the plaintiff against the defendant its costs and disbursements taxed therein in the sum of $26.00, and in giving judgment in favor of the plaintiff in [123] any sum whatever against the defendant.

XXXVI.

The Court erred in not entering judgment for the defendant against the plaintiff in accordance with the prayer of defendant's answer as contained in its counterclaim in said answer.

WHEREFORE, defendant prays that said judgment be reversed and that this cause be remanded to the District Court of the United States for the District of Oregon, with directions to enter judgment in favor of the defendant and against the plaintiff

in accordance with the prayer in the counterclaim of defendant's answer, or that the same be reversed with directions to the Court to take such further proceedings in said cause as this Court shall direct.

JAMES G. WILSON
JOHN F. REILLY
Attorneys for Defendant.

Due service of the foregoing Assignment of Errors and the receipt of a true copy thereof, duly certified to be such by James G. Wilson, one of the defendant's attorneys, is hereby admitted at Portland, Oregon, this 15th day of January, 1935.

C. A. HART
Attorney for Plaintiff.

[Endorsed]: Filed January 15, 1935. [124]

AND AFTERWARDS, to wit, on Tuesday, the 15th day of January, 1935, the same being the 58th JUDICIAL day of the Regular November TERM of said Court; present the HONORABLE John H. McNary, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [125]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL

The defendant and appellant in the above entitled action having prayed for the allowance of an appeal in this cause to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment made and entered in the above entitled action by

the District Court of the United States for the District of Oregon, on the 30th day of October, 1934, and from each and every part thereof, and having presented and filed its petition for appeal, assignments of error, and prayer for reversal, pursuant to the statute and rules in such cases provided,

IT IS NOW HEREBY ORDERED that an appeal be and the same is hereby allowed from this Court to the United States Circuit Court of Appeals for the Ninth Circuit in said cause as provided by law, and

IT IS FURTHER ORDERED that the Clerk of this Court shall prepare and certify a transcript of the record, proceedings and judgment in this cause, and transmit the same to the said United States Circuit Court of Appeals for the Ninth Circuit [126] within thirty days from this date.

IT IS FURTHER ORDERED that the amount of the bond on said appeal to be given by the said defendant be and the same is hereby fixed at the sum of $7,000.00 to act both as a cost bond and as a supersedeas on such appeal.

Dated this 15th day of January, 1935.

JOHN H. McNARY

Judge of the United States District Court for the District of Oregon.

Service admitted Jan. 15, 1935.

C. A. HART

Of Attorneys for Plaintiff.

[Endorsed]: Filed January 15, 1935. [127]

AND AFTERWARDS, to wit, on the 15th day of January, 1935, there was duly FILED in said Court, a BOND ON APPEAL, in words and figures as follows, to wit: [128]

[Title of Court and Cause.]

BOND ON APPEAL FOR COSTS AND AS A SUPERSEDEAS

KNOW ALL MEN BY THESE PRESENTS, that The Northern Pacific Terminal Company of Oregon, an Oregon corporation, as principal, and St. Paul-Mercury Indemnity Company of St. Paul, Minnesota, a corporation, as surety, are held and firmly bound unto Spokane, Portland and Seattle Railway Company, a corporation, the above named plaintiff, in the full sum of $7,000.00 to be paid to the said Spokane, Portland and Seattle Railway Company, or its assigns, for which payment well and truly to be made we bind ourselves jointly and severally, and the successors and assigns of each of us, firmly by these presents.

The condition of this bond is such that

WHEREAS, the above named principal, The Northern Pacific Terminal Company of Oregon is prosecuting an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment rendered and entered in the above entitled cause by the District Court of the United States for the District of Oregon, on to wit: the 30th day of October, 1934, in favor of the plaintiff and against the defendant, [129]

NOW THEREFORE, if the said The Northern Pacific Terminal Company of Oregon shall prosecute its said appeal to effect and answer all damages and costs if it fail to make its plea good and pay said judgment to the extent that it shall be affirmed, then the above obligation shall be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the principal and surety have caused these presents to be executed by their respective officers thereunto duly authorized this 15th day of January, 1935.

[Seal] THE NORTHERN PACIFIC TERMINAL COMPANY OF OREGON.

By E. L. KING
President.

Attest: A. C. SPENCER
Secretary.

[Seal] ST. PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL, MINNESOTA

By S. W. DeGRAFF
Its Attorney in Fact.

Countersigned at Portland, Oregon, this 14th day of January, 1935.

DEPOSIT INSURANCE AGENCY

HARRIETT JOHNSON
Resident Agent.

This bond is approved as to form, amount and sufficiency of surety, this 15 day of January, 1935.

JOHN H. McNARY
District Judge.

Due service of the within Bond on Appeal is admitted this 15th day of January, 1935.

C. A. HART,
Attorneys for Plaintiff.

[Endorsed]: Filed January 15, 1935. [130]

[Title of Court and Cause.]

CITATION ON APPEAL

The President of the United States of America to Spokane, Portland and Seattle Railway Company, plaintiff above named,

GREETING:

Whereas, The Northern Pacific Terminal Company of Oregon, defendant above named, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment rendered and entered in the District Court of the United States for the District of Oregon on the 30th day of October, 1934, in favor of plaintiff, against the defendant, and has given the security required by law, you are hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at the Courtroom

thereof, in the City of San Francisco, State of California, within thirty days from the date hereof, to show cause, if any there be, why said judgment should not be reversed and corrected and speedy judgment should not be [1] done by the parties in that behalf.

Given under by hand at Portland, Oregon, in said District of Oregon, this 15th day of January, 1935.

JOHN H. McNARY

Judge of the District Court of the United States for the District of Oregon.

Due service of the foregoing Citation on Appeal and the receipt of a true copy thereof, duly certified to be such by James G. Wilson, one of defendant's attorneys, is hereby admitted at Portland, Oregon, this 15th day of January, 1935.

C. A. HART

Attorney for Plaintiff. [2]

Due service of the within Citation on Appeal is admitted this .... day of January, 1935

....

Attorneys for Plaintiff

[Endorsed]: Filed Jan. 15, 1935. [3]

AND AFTERWARDS, to wit, on the 15th day of January, 1935, there was duly FILED in said Court, a PRAECIPE FOR TRANSCRIPT, in words and figures as follows, to wit: [131]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the above entitled Court:

You are hereby requested to prepare and certify a transcript of record in the above entitled cause to be transmitted to and filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an order allowing an appeal in the above entitled cause, and to include in such transcript of record the following:

(1). Complaint.

(2). Answer.

(3). Reply.

(4). Stipulation waiving jury trial.

(5). Bill of Exceptions.

(6). Findings and Conclusions signed by the Court and filed October 30, 1934.

(7). Judgment.

(8). Assignment of errors.

(9). Petition for Appeal.

(10). Order allowing appeal and fixing amount of bond. [132]

(11). Citation on appeal with admission of service.

(12). This praecipe and any and all endorsements on the foregoing papers.

(13). Order keeping open term for settling Bill of Exceptions.

Dated this 15th day of January, 1935.

JAMES G. WILSON
JOHN F. REILLY
Attorneys for Defendant-Appellant.

Due service of the within Praecipe is admitted this 15th day of Jan. 1935.

C. A. HART
Attorneys for Plaintiff.

[Endorsed]: Filed January 15, 1935. [133]

AND AFTERWARDS, to wit, on Friday, the 8th day of February, 1935, the same being the 79th JUDICIAL day of the Regular November, 1934, TERM of said Court; present the HONORABLE John H. McNary, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [134]

[Title of Court and Cause.]

ORDER

The Court does hereby identify as received in evidence and considered in the above entitled cause, Plaintiff's Exhibit 1, a map showing the switching zones within the City of Portland, Oregon, and Defendant's Exhibit I, a white print showing the district known as Guilds Lake, that said Exhibits were referred to and identified as a part of the

Bill of Exceptions settled and allowed in this cause.

IT IS FURTHER ORDERED that said Exhibits shall be retained in the custody of the Clerk of the United States District Court at Portland, Oregon, for use of the parties in the preparation of briefs in said cause, and shall be transmitted to the Clerk of the Circuit Court of Appeals for the Ninth Circuit at the time of argument.

IT IS FURTHER ORDERED that the printing of said exhibits may be omitted and that it shall not be necessary to print the same as a part of the record in said cause.

Done and dated this 8th day of February, 1935.

JOHN H. McNARY
District Judge.

Approved:
(Sd) OMAR C. SPENCER
Of Attorneys for Plaintiff

JAMES G. WILSON
Of Attorneys for Defendant

[Endorsed]: Filed February 8, 1935. [135]

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from 4 to 135 inclusive, constitute the transcript of record upon the appeal from the judgment of said

court, in a cause then pending therein in which the Spokane, Portland and Seattle Railway Company, a corporation, is plaintiff and appellee, and the Northern Pacific Terminal Company of Oregon, a corporation, is defendant and appellant; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said appellant, and has been by me compared with the original thereof, and is a full, true and complete transcript of the record and proceedings had in said Court in said cause, in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is $21.45, and that the same has been paid by the said appellant.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 9th day of February, 1935.

[Seal] G. H. MARSH

Clerk [136]

[Endorsed] No. 7771. United States Circuit Court of Appeals for the Ninth Circuit. Northern Pacific Terminal Company of Oregon, a Corporation, Appellant, vs. Spokane, Portland and Seattle Railway Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed February 11, 1935.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7771 14

United States
Circuit Court of Appeals
For the Ninth Circuit

THE NORTHERN PACIFIC TERMINAL COMPANY, a corporation,
Appellant,
vs.
SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a corporation,
Appellee.

Upon Appeal from the United States District Court for the District of Oregon.

Brief of Appellant

JOHN F. REILLY,
JAMES G. WILSON,
508 Platt Building,
Portland, Oregon.
Attorneys for Appellant.

CAREY, HART, SPENCER & McCULLOCH,
Yeon Building,
Portland, Oregon,
Attorneys for Appellee.

FILED
AUG - 7 1935
PAUL P. O'BRIEN,

HOUGHTON-CARSON COMPANY, PRINTERS, PORTLAND, OREGON

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United States
Circuit Court of Appeals
For the Ninth Circuit

THE NORTHERN PACIFIC TERMINAL COMPANY, a corporation,
Appellant,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a corporation,
Appellee.

Upon Appeal from the United States District Court for the District of Oregon.

Brief of Appellant

STATEMENT

For convenience in this brief we will refer to The Northern Pacific Terminal Company of Oregon as the NPT Co., or the Terminal Company, and the Spokane, Portland & Seattle Railway Company as the S. P. & S. Co.

The main question involved in this case is whether or not the NPT Co. is entitled to participate as a carrier with the S. P. & S. Co. in the switching charges for the transportation of fuel oil in carload lots from oil plants located within the limits of Portland, Oregon,

switching district on the line of the S. P. & S. destined to the oil storage tank in the Guilds Lake District on the line of the NPT Co. also within the switching limits of Portland switching district where the shipments were billed to the NPT Co. at Guilds Lake and were for use as fuel for the engines of the NPT Co. and required a transportation service by the NPT Co. from the point of interchange between the lines of the S. P. & S. and NPT Co. to reach the oil storage tank on the line of the NPT Co.

Both the interchange track and the oil storage tank of the NPT Co. are in what is known as the Guilds Lake District. The switching rate from the point of shipment on the line of the S. P. & S. to the oil storage tank of the NPT Co. was the same as the rate to the interchange point by reason of the fact that the switching rates in the Portland switching district were established on the zone basis and all switching rates from points in one zone to all destinations in a particular zone are the same. In establishing the point of interchange between the lines of the parties to this case the line receiving shipments of cars from the other, designates the point of interchange, that is, the point where the receiving line will receive shipments of cars from the other. The NPT Co. designated as the interchange track at which it would receive shipments from the S. P. & S., a track in the make-up and break-up yard in Guilds Lake. This yard is located in the Guilds Lake district alongside the main track of the S. P. & S. Except for making an interchange to the NPT Co. the S. P. & S. had no right to come upon any track in

Guilds Lake. After the shipments were placed upon the interchange track in order to reach the oil storage tank in Guilds Lake it required the Terminal Company to segregate the oil tanks destined to it at Guilds Lake from the entire interchange shipments, pulling them a distance from three-quarters to a mile through a switch and spot them at the oil storage tank where pumping facilities were located to pump the oil into the storage tank.

Under the agreement of the carriers, parties to the Portland switching zone tariff, it is provided that the rate shall be divided equally between the carriers participating in the transportation. In this case the NPT Co. claims that two parties participated, to wit: the S. P. & S. and the NPT Co. and that the NPT Co. was entitled to half the switching charges for its transportation service. The S. P. & S. claims that had the shipments been billed to the NPT Co. at the storage tank at Guilds Lake instead of simply to Guilds Lake the NPT Co. would have been entitled to one-half the switching charge, but being billed simply to the NPT Co. at Guilds Lake the transportation service was completed at the interchange track and therefore the S. P. & S. was entitled to the entire switching charge. The NPT Co. maintains that the shipments were at all times destined to the oil storage tank at Guilds Lake, that it had no part in the billing of the shipment, that the S. P. & S. at all times knew that the shipments were destined to the oil storage tank, that it made the billing and if there was any doubt in its mind or there was any necessity to designate the particular track on which said

shipments were to be delivered it was its duty to ascertain from the shipper the actual destination in view of the fact that both the interchange point and the oil storage tank were in what is known as Guilds Lake or Guilds Lake district, and furthermore, on August 18, 1926, it was specifically advised in writing that all the shipments so being transported were so destined. The shipments were moving on an average of almost a car a day, at least several cars a week.

The shipments started to move on the 1st day of February, 1923. The parties were unable to agree as to the rule to be applied, the Terminal Company maintaining that it was entitled to one-half of the switching charge, and on August 18, 1926, the Comptroller of the Terminal Company made written demand of the agent of the S. P. & S. for its proportion of the switching charge. On the 26th day of August, 1926, the General Freight Agent of the S. P. & S. declined to recognize the claim, not on the basis that the shipments were not billed to the fuel oil spur, but upon the ground that inasmuch as the shipments were consigned to the Terminal Company the S. P. & S. after placing them on the interchange track had no further interest in the shipments and that to share the charge with the Terminal Company would be rebating. Later, however, the S. P. & S. recognized the right of the Terminal Company to participate in the switching charge and paid the Terminal Company one-half the switching charge for all shipments moving after April 1, 1929. It is these payments that the S. P. & S. seeks to recover in this case and was allowed to do so by the lower court.

On September 20, 1933, the S. P. & S. filed its complaint in the lower court in which it alleged that between April 1, 1929 and January 4, 1930, it had transported from Willbridge, within the City of Portland, 286 carload shipments of fuel oil to Guilds Lake yard and delivered the same to the defendant, that it had on file both with the Interstate Commerce Commission and with the Public Service Commission of Oregon a published tariff which stated the rate to be $8.55 per car, that the total charges on said 286 cars was the sum of $2445.30, and further alleges that between the 8th day of January, 1930, and the 4th day of January, 1932, it transported from Linnton, within Portland, Oregon, 644 cars of fuel oil to the Guilds Lake yard, and there delivered the same to the defendant, that the total charges on 644 cars was the sum of $5670.56, that between the 2nd day of January, 1932, and the 28th day of March, 1932, it transported 87 cars to the Guilds Lake yard and delivered the same to the defendant, the charges on these 87 cars were $9.40 per car, and the total charges were $817.80; that the total charges for all said shipments were $8933.66. It further alleges that the defendant was not a participating carrier and was not entitled to share in said charges, and that through mistake the S. P. & S. had not charged or collected the full amount specified in the applicable tariff, and that defendant was indebted to the plaintiff in the amount of such allowance and payment so mistakenly made in the total sum of $4466.83, being one-half of the total charges for such shipments. (Tr. 2-6.) In answer the defendant, appellant here, denied that

anything was due from the appellant to appellee, admitted, with the exception of an immaterial error as to the number of shipments moving, that the shipments had moved, admitted the amount of the rate as established by the tariff, maintained that the Terminal Company was a participating carrier and entitled to one-half the rate. (Tr. 7-12.) As a separate answer and defense the Terminal Company set up that it was a party to the Portland Switching zone tariff, together with the S. P. & S., and other carriers within the Portland switching zone, set up the rates established by the tariff, that both the originating point and destination point were within the same zone, to wit: zone 5, established by the tariff, set up the fact that the Terminal Company had designated a track in the Guilds Lake yard as the point of interchange on shipments moving to the Terminal Company from the S. P. & S., that the Terminal Company had participated in the transportation service and was entitled to one-half the switching charges applying on such shipments. That on the shipments from the Standard Oil Company plant at Willbridge the Terminal Company had purchased the oil f. o. b. the fuel oil spur in the Guilds Lake terminal, and that said shipments were the shipments moving up to January 4, 1930, and that on the shipments moving from the Richfield Oil Company, being those moving subsequent to January 4, 1930, the oil was purchased f. o. b. Richfield Oil Company spur at Linnton, and that the Terminal Company was entitled to one-half the revenue on all said shipments. As a second defense the defendant sets up a counterclaim

by reason of the shipments made, and that it was entitled on account of said shipments to recover of and from the S. P. & S. the sum of $8620.49. (Tr. 12-20.) A reply was filed on the 21st day of December, 1933, putting in issue the separate answers and defenses of the Terminal Company.

After trial by the Court without a jury, the lower court made findings and gave judgment in favor of the plaintiff in the sum of $4,440.22, interest at 6% from April 26, 1932, and costs.

Manner in Which Question Arises

The main question in this case arises in the following manner: the case was tried to the Court without a jury, a jury having been waived by stipulation in writing. Before the case was submitted to the Court the defendant requested of the Court, rulings on questions of law as follows:

> "(1) Whether or not in connection with the transportation of company material, consigned to a common carrier, where the receiving carrier and the consignee carrier have entered into joint tariffs providing rates from points on the initial carrier to points on the consignee carrier, it is as a matter of law necessary that the bill of lading shall specify the particular track upon the line of the consignee carrier at which such shipment is to be delivered where the junction point of the lines of the two carriers and the track of the consignee carrier on which said shipment is to be delivered, are both within the district as shown as the destination of said shipment and the track on which delivery was made and intended to be made at the time of the delivery of the shipment to the initial carrier can-

not be reached by the line of the initial carrier, and where the initial carrier at the time of receiving the shipment had knowledge of the particular track on which said shipment was intended to be made and at which it was actually made.

"The above request by defendant was overruled and denied, to which ruling of the Court the defendant excepted and its exception is allowed and noted." (Tr. p. 104.)

"(2) Whether or not it was the duty of the initial carrier, on receiving a shipment of company material, consigned to a connecting consignee carrier, and by the joint tariffs of the two carriers the same rate applies not only to the point of junction of the two carriers, but to other points on the line of the consignee carrier at which delivery could not be made by the initial carrier to require definite instructions as to the actual track at which delivery is to be made, and insert the same in the bill of lading issued for said shipment by the initial carrier, or to require specific instructions as to the track of delivery [95] and see that proper instructions are given for such delivery where the junction point of the lines of the two carriers and the track of delivery are both within the description of the destination as actually inserted in the bill of lading issued by the initial carrier.

"The above request by defendant was overruled and denied, to which ruling of the Court the defendant excepted and its exception is allowed and noted." (Tr. p. 105.)

In addition to the foregoing requests on the rulings on questions of law the defendant requested findings of fact and conclusions of law on the theory of the case contended by the defendant was established by the evidence and the law applicable thereto. (Tr. 106-113.)

These requested findings cover the question of the character of Guilds Lake and the tracks and other facilities located thereon. (Requested Finding No. III.)

The location of the oil tank for storage of fuel oil. (Requested Finding No. IV.)

That the plaintiff had no right to make delivery in said Guilds Lake District. (Requested Finding V.)

The establishment of the tariff rate by proper publication and filing. (Requested Findings VI and VII.)

Division of the rate agreed upon. (Requested Finding VIII.)

The shipments purchased from the Standard Oil Company were on contracts for delivery f. o. b. at the oil tank at Guilds Lake. (Requested Finding IX.)

That the subsequent shipments were sold f. o. b. seller's plant. (Requested Finding X.)

The making of the shipments and contract of carriage between the plaintiff and the seller of the oil, the designation of consignee and destination and routing contained in the bill of lading. (Requested Finding XI.)

That the shipments were transported by the S. P. & S. to the interchange track and from the interchange track were transported to the oil storage tank at Guilds Lake by the defendant. (Requested Finding XII.)

The balance of the requested findings were with reference to the number of cars shipped between certain

dates, the revenues earned, and the amount of charges claimed by defendant under its right to one-half thereof. Finally, the fact that the plaintiff had full knowledge at all times after the 26th day of August, 1926, when the shipments were made of the destination thereof at the storage tank in Guilds Lake. (Requested Finding XVI.)

The conclusions of law requested particularly material to the main question here involved were:

(1) That the defendant had the right to participate in the rate charged where the transportation service extended beyond the junction of the tracks of the two parties. (Requested Conclusion I.)

(2) That it was the duty of the plaintiff who issued the bill of lading to see that the proper destination was designated or secure sufficient information to make the destination definite. (Requested Conclusion II.)

(3) That the bills of lading issued sufficiently showed that the transportation service extended onto the line of the defendant. (Requested Conclusion III.)

(4) That irrespective of any alleged insufficiency of the bill, the plaintiff had knowledge of the destination of such shipments. (Requested Conclusion IV.)

(5) That with knowledge of the actual track to which the shipment was to be delivered it was not necessary that said destination be specifically designated in the bill of lading. (Requested Conclusion V.)

(6) That the defendant participated as a common carrier in each and all of the shipments and is entitled

to collect half the charge. (Requested Conclusion VI.)

The balance of said conclusions relate to the amount earned and the amount defendant was entitled to recover. These requests for findings and conclusions are found on pages 106 to 113 of the transcript. These requests were submitted to the Court before the submission of the cause and each and all of said requested findings and conclusions were denied separately and disallowed and to the denial and refusal of the Court to make each of said requested findings and conclusions an exception was allowed. (Tr. 114.)

The defendant, before submission of said cause, also requested and moved the Court for judgment in its favor and specific form of judgment submitted giving judgment in the amounts claimed by the defendant for its share of the switching charges. (Tr. 115-116.) Said request and motion was denied by the Court and to its refusal an exception was taken and allowed (Tr. 116.)

The request for rulings on questions of law above referred to are preserved in Assignments of Error I and II. (Tr. 126-127.)

The request for Findings of Fact as hereinbefore outlined are preserved in Assignments of Error V to XVIII. (Tr. 127-130.)

The error of the Court in refusing to make the Conclusions of law are preserved by Assignments of Error XIX to XXVII, inclusive. (Tr. 130-131.)

The error of the Court in refusing to make and enter the judgment requested by the appellant is preserved in Assignment of Error XXVIII. (Tr. 131.)

In addition to the foregoing the plaintiff in this case requested certain findings of fact and conclusions of law which were allowed by the Court. Appellant filed objections to Finding of Fact III. (Tr. 117.) Finding of Fact V (Tr. 118), Finding of Fact VII (Tr. 119) and particularly to that portion of said findings in which plaintiff requested and which were subsequently allowed by the Court a finding that the shipments in question were transported by the plaintiff to Guilds Lake in accordance with bills of lading issued to cover said shipments and at Guilds Lake were delivered to the defendant. These objections were overruled by the court and an exception was allowed to the defendant in each case. (Tr. 118, 119, 121, 122, 123.) These errors are preserved by Assignments of Error XXIX, XXX and XXXI, it being the claim in this particular that no delivery was made by plaintiff at Guilds Lake but merely an interchange and that further transportation service was performed by appellant in transporting said shipments to their intended destination in Guilds Lake at the storage tank.

Plaintiff also objected to the conclusion of law requested by the plaintiff and subsequently signed by the Court to the effect that plaintiff was entitled to judgment against defendant in the amount claimed by plaintiff (Tr. 122) which objection was overruled and denied by the Court and the error was preserved by Assignment of Error XXXIV. The defendant also assigned as error the error of the Court in granting judgment in favor of plaintiff and against defendant in the amount allowed. (Tr. 133.)

SPECIFICATION OF ERRORS RELIED UPON BY APPELLANT

The appellant will rely in this court upon the following errors claimed to have been committed by the lower court:

I.

Error of the court in finding that plaintiff transported the shipments involved and delivered the same to the defendant at Guilds Lake in accordance with the bills of lading issued to cover said shipments, (Findings III, V, VII, Tr. 30, 31, 32, Assignments of Error XXIX XXX, XXXI, Tr. 132) and in refusing to find as requested by defendant that defendant performed a part of the transportation service in transporting said shipments from the interchange track to the oil spur also within Guilds Lake and the intended and known destination of said shipments. (Defendant's requested finding XII, Tr. 110, Exception, Tr. 114, Assignment of Error XIV, Tr. 129, Requested Conclusions III, IV, V and VI, Tr. 112-113, Exception, Tr. 114, Assignments of Error XXI, XXII, XXIII, XXIV, Tr. 130-131).

II.

Error of the Court in refusing to rule on defendant's request for ruling on question of law No. I as to whether or not the bill of lading covering shipments of company material consigned to a consignee carrier is required to specify the particular track on which said

shipments are to be delivered where the junction point of the two lines and the track to which said shipments are to be delivered are both within the destination specified in the bill of lading and the originating carrier knows the intended destination of said shipments. (Tr. 104, Assignments of Error I, Tr. 126.) This requested ruling is set out in full on page 7 ante.

III.

Error of the court in refusing to rule on defendant's request for ruling on question of law No. II as to whether or not it was the duty of the initial carrier on receiving the shipment of company material to specify in the bill of lading the particular track on which said shipment was to be delivered where it had or secured proper instruction as to the track of delivery where the junction point of the two lines as well as the known delivery track were both within the destination specified in the bill of lading. (Tr. 105, Assignment of Error II, Tr. 127.) This requested ruling is set out at large at page 8 ante.

IV.

Error of the court in failing to make and find Conclusion of Law No. II requested by the defendant to the effect that it was the primary duty of the initial carrier in accepting a shipment to see that the bill of lading properly shows the destination or to secure information to make definite the actual destination of the shipments.

(Tr. 112, Exception, Tr. 114, Assignment of Error XX, Tr. 130.)

V.

Error of the Court in failing to hold that the plaintiff is estopped to claim any insufficiency in the designation of the destination shown in the bills of lading by reason of the fact that when demand was made by the defendant for a part of the transportation charge the refusal to pay the defendant a portion of said charge was made on the ground that to pay any portion thereof to the defendant would be an illegal rebate and no objection was made on the ground of any insufficiency of the bill of lading.

VI.

Error of the Court in refusing to give judgment in favor of the defendant and against the plaintiff as requested by defendant. (Tr. 115-116, Exception, Tr. 116, Assignments of Error XXVIII and XXXVI, Tr. 131, 133.)

VII.

Error of the Court in giving and signing judgment in favor of plaintiff and against the defendant. (Tr. 35, Assignment of Error No. XXXV, Tr. 133.)

In the trial of this case all of the evidence was presented, all of the requests for rulings on questions of law, for findings and conclusions and judgment were made

by defendant with a view of presenting and preserving the one fundamental question, to wit: as to whether or not the shipments involved in this case were destined to a point on the line of the defendant beyond the junction point of the two lines by reason of which the defendant participated as a common carrier in the transportation service and was thereby entitled to a portion of the transportation charge. In the foregoing part of this brief, under the heading, "Manner in Which Question Arises", the defendant has set out with transcript references the various requests, exceptions and assignments of error to preserve this question. The above specific specifications of error under this point raise the same question.

ARGUMENT

Proposition of Law I

A carrier to whom a shipment of company material is consigned may participate in the transportation and share in the transportation charge where the shipment originates on the line of one carrier and is destined to a point beyond the junction on the line of a receiving carrier to whom the shipment is consigned, and where divisions have been established the originating carrier is entitled only to its division of the through rate from point of origin to point of destination.

> Tuckerton R. Co. v. Penn. R. R. Co., 52 I.C.C. 319.
>
> Rates on Railroad Fuel and Other Coal, 36 I.C.C. 1.
>
> Mississippi River & Bonne Terre R. Co. v. Director General, 55 I.C.C. 677.

Appellant will contend that the shipments in question were shipments from a point on the line of the S. P. & S. to a point beyond the junction of the lines of the two carriers here involved, that the carriers had entered into a joint tariff establishing a rate between the origin point and the destination point, that the appellant performed a part of the transportation service and was entitled to receive as transportation charge one-half of the through rate from point of origin to point of destination.

There is little difference between the parties hereto on the question of fact. This case on the main point involved depends primarily upon the application of the law. The appellee does not question the principle of law above cited but claims the transportation service terminated at the interchange point between the two lines and not at the oil tank of the appellant in Guilds Lake. It concedes that if the bill of lading had designated the oil spur in Guilds Lake as the destination instead of simply Guilds Lake the Terminal Company would have been entitled to participate and received one-half the transportation charge.

The shipments in question all originated at either the plant of the Standard Oil Company located on the S. P. & S. line about a mile north of the interchange track at Guilds Lake, the particular district being known as Willbridge, or at the plant of the Richfield Oil Company at the district known as Linnton on the line of the S. P. & S. about four miles north of the interchange track at Guilds Lake. (Tr. p. 38.) All of the shipments involved up to and including January 4, 1930, originated at the Standard Oil plant. The Terminal Company had by contract purchased from the Standard Oil Company its supply of fuel oil for its engines, the contract providing that the oil should be delivered to the Terminal Company f. o. b. fuel oil spur Guilds Lake Portland. (Stipulation, Tr. 96.) The oil purchased from the Richfield Oil Company constituting all of the shipments moving subsequent to January 4, 1930, were purchased by the Terminal Company f. o. b. Richfield oil plant at Linnton. From the

inception of these shipments until the end there was a total of 3076 cars moved, making an average of almost a car of oil a day.

All of the rail carriers in the City of Portland had joined in and filed both with the Interstate Commerce Commission and with the Public Service Commission of Oregon a tariff providing switching rates from all originating points within what is known as the Portland switching district to all other points within said district. This tariff cut the Portland district up into seven zones, and established rates for movements within a single zone or from one zone to another, the rate varying as to the number of zones through which a particular shipment moved. (Tr. 38 et. seq.) Zone No. 5 in the tariff is the only zone involved in the shipments here involved for both the originating point, the entire movement and the destination point were within Zone 5. The switching rate provided by the tariff for movement from one point to another in the same zone at all times was $8.55 per car, with the exception of a short period when the rate was increased to $9.20 per car. There is no dispute between the parties as to the measure of rate at any time but only as to the right of the Terminal Company to a division thereof. The agreement between the parties to the switching tariff provided that the switching charge should be divided equally between the carriers participating in the switching service. If there were three carriers participating in the service the charge was divided equally three ways. If there were but two as claimed by the appellant in this case the rate would be divided equally between them. Zone

5 with a few exceptions not material to this case was described in the tariff as all tracks on the west side of the Willamette River north of Nicolai Street to the north boundary of Linnton, and there is no dispute between the parties that the originating point, the interchange track and the oil storage tank of the Terminal Company at Guilds Lake were all within this zone. Within the zone the rates were blanketed, that is, the rate was the same from any originating point within the zone to any destination point within the zone so that whether the destination of these shipments was the interchange track at Guilds Lake or the oil spur track at Guilds Lake the rate would be the same.

Guilds Lake is a tract of land consisting of a break-up and make-up yard, roundhouse where the engines are hostled, oil storage tank, passenger coach cleaning yard, supply warehouse, and repair shop. All of Zone 5 is within the Portland switching district. The main line of the S. P. & S. within this district starts at what is denominated in the tariff the North boundary of Linnton. This main line proceeds in a southerly direction paralleling the river, passing in order southerly the oil plants at which the shipments originated, Guilds Lake and thenceforth south into the main yards and facilities of the S. P. & S. at Portland. Paralleling the main line of the S. P. & S. is the make-up and break-up yard at Guilds Lake. This yard extends alongside the main track of the S. P. & S. for a distance of about three-quarters of a mile. The roundhouse, however, at which the oil storage tank of the Terminal Company is located is not adjacent to this

make-up and break-up yard but to reach it requires a movement of one-half or three quarters of a mile whereby locomotives and cars are required to move south onto the main lead to the make-up and break-up yard and switch back into the roundhouse and oil storage tank track. However, all of the development of the Terminal Company, including the make-up and break-up yard, the roundhouse, oil storage tank, the supply warehouse, coach cleaning yard, and repair shop are all within what is known and designated as Guilds Lake.

In the interchange of business between the S. P. & S. and the Terminal Company the receiving line designates to the other line the track known as the interchange track on which the carrier transferring cars to the other shall place the cars to be transferred. The carrier therefore on any business to be transferred to the other places the cars upon the interchange track designated by the receiving carrier and the receiving carrier picks them up and transports them to the destination on its line or transports them to some connection with another carrier for further transportation. In this interchange between the carriers the Terminal Company designated to the S. P. & S. as the interchange track a track in the make-up and break-up yard at Guilds Lake. The S. P. & S. in this interchange designated as its interchange track a track at the Admiral Dock one and one-half miles further south. It so happened therefore that the interchange track designated by the Terminal Company on which it would receive interchange shipments was within the territory known as Guilds Lake. The Terminal Company could

have designated any other track at which there was a junction of the two lines upon which it would receive shipments and in the event of such designation the S. P. & S. in making interchanges would have had to take the cars in question to the track so designated and the Terminal Company would have picked them up and taken them to the oil storage tank in Guilds Lake. Had such track outside of Guilds Lake been designated by the Terminal Company as the interchange track there would be no question between the parties hereto as to the right of the Terminal Company to receive one-half the switching charges in question, even with the bills of lading reading as they did, for in that event the S. P. & S. concedes the Terminal Company would have performed a transportation service on the shipments. (Tr., bottom of p. 59.)

In making the shipments in question the S. P. & S. picked up the cars at the Standard Oil Plant at Willbridge and issued its bill of lading to the Standard Oil Company, attached the cars to its trains and placed them, together with other cars to be interchanged to the Terminal Company, on the interchange track at make-up and break-up yard at Guilds Lake. In order to get these cars on the oil track at Guilds Lake the Terminal Company was compelled to switch them out of the general interchange and transport them from the make-up and break-up yard out on the main lead and back into the storage track, as heretofore designated, a distance in the neighborhood of three-quarters of a mile. (Tr. 85, 89.)

The freight, as far as the Standard Oil Company was concerned, was all prepaid by that company to the S. P. & S. The S. P. & S. refused to account and pay to the Terminal Company one-half of this charge, not on the ground as is now contended by the S. P. & S., but on the ground that inasmuch as the shipments were consigned to the Terminal Company to permit the Terminal Company to participate in the revenue would be a form of rebating which would be unlawful.

On August 18, 1926, E. L. Brown, then Comptroller of the Terminal Company, addressed a letter to H. Sheedy, agent of the S. P. & S., as follows: (Tr. 60)

"August 18, 1926.

Mr. H. Sheedy, Agent,
Spokane, Portland & Seattle Railway Co.
Portland, Oregon.

Dear Sir:

Upon investigation of cars delivered by S. P. & S. Ry. to Nor. Pac. Terminal Company of fuel oil, billed to N. P. T. Co., we find all the revenue is absorbed by the S. P. & S. Ry. We think this practice is wrong as under the switching tariff the Nor. Pac. Terminal Co. should get 50% of this revenue.

We have had this matter up with our General Yardmaster and he reports as follows:

'S. P. & S. merely deliver to us in transfer at Lake Yard loaded. We set cars to roundhouse and heating plants for unloading. When cars are empty we return to S. P. & S. (Deliver them into their Yard).' [62]

It is manifestly evident that the Terminal Company performs a part of the switching after re-

ceiving the cars from you, also in delivering the empty cars back to your yard. Under the arrangement of the zone switching tariff, we are entitled to 50% of the revenue where two companies participate in the switching.

Please acknowledge receipt.

Yours truly,

E. L. BROWN."

The letter of Mr. Pickard, General Freight Agent of the S. P. & S. in reply to the above reads as follows: (Tr. p. 61)

"Portland, Oregon, August 26, 1926.

Mr. E. L. Brown, Comptr.,
Northern Pacific Terminal Co.
Portland, Oregon.

Dear Sir:

Your letter August 18th, file C-141, addressed to Mr. H. Sheedy, has been referred to this office.

Inasmuch as these cars are consigned to the Terminal Company, insofar as the S. P. & S. is concerned, when they are set by us on the interchange with your line we are no longer interested in what is done with them. Delivery has been made to the Terminal Company at the nearest point and to give you a refund through the subterfuge of permitting you to participate in the division by reason of your switching it from the interchange over to the roundhouse, it seems to me would be nothing more or less than a modified form of rebating, in view of the oft expressed opinion of the Interstate Commerce Commission that a carrier performing service for another carrier, as we are doing for you in this instance, must make the same

charge against such other carrier as they would contemporaneously make against any other shipper or consignee.

Your truly,

R. W. PICKARD,
General Freight Agent." [63]

The witness Pickard testified as to what the designation "Guilds Lake" covered as follows: (Tr. p. 62)

> "Guilds Lake covers not only the make up and break up yard but also the roundhouse and other facilities at that point; they have a place for car storage and cleaning, and I imagine have a large supply warehouse there where they keep general supplies for their equipment, and I am sure that they have car repairers down there making repairs on the cars. Guilds Lake covers not only this so called make up and break up yard but it covers all of the tracks and facilities there. It is called the Guilds Lake terminal. What the designation on a bill of lading 'Guilds Lake' might mean from the standpoint of the shipper is questionable."

There was no question in the railroad agent's mind as to what was covered thereby.

It will be noted that there is no reference in the above quoted letter of the General Freight Agent of the S. P. & S. to any insufficiency of the billing of the cars. The ground upon which he places his refusal is that inasmuch as the shipments were consigned to the Terminal Company, and inasmuch as the S. P. & S. had placed them on the interchange track, the nearest point, notwithstanding the Terminal Company transported them to the oil track, the S. P. & S. could not

permit the Terminal Company to participate in the rate as it would be an unlawful rebate. An examination of the authorities cited above will demonstrate how incorrect the General Freight Agent of the S. P. & S. was in this position, for the law is firmly established that where a carrier to whom company material is consigned beyond the point of interchange, the receiving carrier may participate in the transportation charge and the forwarding line is entitled only to its division of the rate up to the point of interchange. But the General Freight Agent of the S. P. & S. was corrected in his idea of the law very shortly after his letter, quoted above, by his own counsel for a similar situation arose in connection with fuel oil delivered to one of the other carriers parties to the switching tariff, to wit: the Portland Electric Power Company. Instead, however, of declining the request of the Portland Electric Power Company on the ground that it would be rebating the General Freight Agent submitted the question to Carey & Kerr, by letter dated November 24, 1926, found on page 76 of the transcript, as follows:

"November 24, 1926.

Messrs. Carey & Kerr, Attys.
Yeon Building,
Portland, Oregon.

Dear Sir:—

There is attached a copy of Henry's tariff No. 6-C which names switching rates between points in the Portland Switching Terminals:

We have oil storage tanks located in what is known as the Linnton and Willbridge district, said

district being included in Zone 5 as described in item 70 of the tariff.

The P. E. P. Co. is a user of fuel oil and their storage tanks are located in East Portland north of East Mill Street known in the same item of the tariff as Zone 8.

In item 75 of the tariff it will be noted there is a rate provided on traffic between Zone 5 and 8 of $16.50 per car. The divisions governing the rates as agreed upon between the various lines are that they will divide equally as between the number of lines handling. A copy of the division sheet is also attached.

There are shipments of fuel oil moving from Linnton and Willbridge in Zone 5 to the P. E. P. Co. in Zone 8. This fuel oil, however, is interchanged to the P. E. P. at our interchange track which is located in zone two and the switching rates from Zone 5 to 2 is $14.00 per car. It has been our contention that on company fuel oil for the P. E. P. when we deliver the car to that line at our interchange with them in Zone 2 the movement is complete because the shipment is given to them. They on the other hand contend that the shipment has not reached its destination until it is finally spotted at their storage warehouse in Zone 8. If our contention is correct we would take the entire amount of Zone 5 to Zone 2 of $14.00 per car. If, on the other hand, the P. E. P. Co.'s contention is correct; that is, that the shipment is subject to Zone 5 to Zone 8 rate and they out of that, for their handling from our interchange track to their storage warehouse, get 50% as per the division sheet then the rate and divisions would be as follows: Zone 5 to zone 8 $16.50 of which the P. E. P. Co. would be entitled to $8.25, or 50%.

They contend under the Commission's Conference Ruling No. 225 that the rate to be charged

against them is the rate we would charge to John Jones, for example, and while that is true it seems to me that our reimbursing them with 50% of the revenue would not result in them paying as much freight charges as John Jones for the reason that they would, through the medium of the division sheet, get 50% of it back.

Again there is a grave question as to whether under Conference Ruling 225 they are not entitled to have the shipment billed from zone 5 to their warehouse in zone 8, even though it is their own traffic, and particepate in the division where that would give them a net transportion cost less than the zone 5 to zone 2 rate of which we keep all.

I would like your ruling on this for the reason that there are other movements of the same character involved, such as fuel oil from Willbridge to S. P. Brooklyn storage tanks located in zone 4 and *from Willbridge to the N. P. Terminal storage tanks in Guilds Lake which is within the same zone;* namely, 2 and whatever the ruling is in connection with the P. E. P. situation will likewise apply to the other traffic.

Briefly summed up it seems to be a question of whether or not the other companies at Portland are entitled to a divisional cut out of the switching revenue accruing on their own fuel oil.

Yours truly,

R. W. PICKARD,

EB:FH General Freight Agent."

(Italics ours)

It will be noted in this letter, in submitting the question that he refers to the fact that he had been contending that the delivery was completed when they put the car on the *interchange track.* They have now gone

back to this same contention. The Court will note also that in writing this letter the General Freight Agent refers to the fact that similar movements are being made to the Terminal Company at Guilds Lake, and he desired the ruling to apply in all cases. The ruling of the attorneys will be found on page 79 of the transcript, as follows:

"Portland, Oregon,
November 30, 1926.

Mr. R. W. Pickard, General Freight Agent,
Spokane, Portland and Seattle Railway
Company,
Portland, Oregon.

We have your letter of the 24th instant enclosing copies of tariff stating Portland switching rates, which copies we return herewith.

It seems to us that the Portland Electric Power Company is right in this dispute and that the situation can be corrected only by a different arrangement for divisions. The tap line division cases established the right of an industry to own a common carrier line which, if it was in truth a common carrier line, could legally share in the through rate. The Portland Company is in much the same situation as one of the these industries owning a tap line. It can have its shipments consigned to their actual destination and participate in the division of the freight charge.

Ordinarily it is to the interest of a carrier which is also the consignee of a shipment, to fix the first junction point with the connecting carrier as the bill of lading destination so as to avoid the imposition of commercial freight rates for the full haul. In this case the advantage is the other way

but we see no way of compelling the Portland Company to bill the shipment to the point of connection instead of its actual destination.

CAH:GK
Enclosures CAREY & KERR."

However, the General Freight Agent, although he obtained this ruling for the purpose of guiding him not only with reference to the Portland Electric Power Company, but also with reference to these oil shipments going to the Terminal Company, did nothing with reference to correcting his former position with the Terminal Company that to pay to the Terminal Company a part of the rate would be rebating. Notwithstanding he had been corrected by his counsel he continued to take all of the revenue from the shipments to the Terminal Company, and notwithstanding the fact that he had been informed by the Terminal Company but two months before that the interchange track at Guilds Lake was not the destination of the shipment, and that the Terminal Company was performing a transportation service in transporting them from the interchange track over to the oil tank.

Again, however, the Comptroller of the Terminal Company, on March 20, 1930 (Tr. 98), called attention to the fact that the fuel oil was being transported to the Terminal Company plant where it was unloaded, and that the rate should be $8.55 divided equally. This letter is as follows:

"Portland, Oregon, March 20, 1930.

Mr. S. F. Parr, Agt.,
S. P. & S. Ry. Co.,
Linnton, Oregon.

Dear Sir:

Wish to call your attention to the fact that you have been billing the Northern Pacific Terminal Co. in the amount of $11.50 per car on fuel oil, the rate applicable on cars moving from Zone 5 to Zone 1.

This rate is incorrect. The N. P. Terminal Co. plant, where this fuel oil is unloaded, is located at Guilds Lake Yard in Zone 5 and the rate of $8.55, applicable to an exclusive Zone 5 switch movement should be charged, with an equal division of the revenue between the N. P. T. Co. and the S. P. & S. Ry. Co.

Will you please acknowledge receipt of this letter and advise when an adjustment will be made on the freight bills which we have paid to the S. P. & S. at Linnton, where the incorrect rate was applied? Your asumption that our Guild's Lake plant was located in Zone 1 is incorrect. It is located in Zone 5.

Yours truly,
(Sgd) C. B. Shibell,
Comptroller."

This time the Comptroller of the S. P. & S., Mr. Crosbie, replied, but still insisted that the Terminal Company was not participating in the haul. His letter is dated March 29, 1930, and is as follows: (Tr. 99)

"March 29, 1930.

Mr. C. B. Shibell, Comptroller,
Northern Pacific Terminal Company,
Portland, Oregon.

Dear Sir:

SWITCHING CHARGES ON FUEL OIL FOR NORTHERN PACIFIC TERMINAL COMPANY

Referring to your letter of March 20th, file C 201, to agent at Linnton, in regard to charges billed you on shipments of your fuel oil to Portland where you have been billed a Zone 5 to Zone 1 charge of $11.50 per car instead of the Zone 5 rate of $8.55; [91]

It is our understanding that these shipments are billed to connection with your line at Guild's Lake and should be handled on S. P. & S. local switching settlement statements, your line not participating in the haul. Charges should, therefore, be adjusted to $8.55 per car which amount should accrue to the S. P. & S. As settlement has been made allowing your line $5.75 per car out of the revenue, adjustment should now be made reducing the charges to $8.55 per car which amount would accrue to the S. P. & S. making a balance in favor of the S. P. & S. of $2.80 per car.

Please advise if you will accept our bill for adjustment on this basis or do you prefer to handle thru agents account. We believe that adjustment could be expedited, with the lease inconvenience to all concerned, if handled thru audit bill instead of thru the agents' account.

(Sgd) Robt. Crosbie,
Comptroller."

Immediately, on April 1, 1930, the Comptroller of the Terminal Company, addressed the Comptroller of the S. P. & S., in his effort to correct this situation, as follows: (Tr. 100)

"April 1, 1930.

Mr. Robert Crosbie, Comptroller,
Spokane, Portland & Seattle Railway Co.,
Portland, Oregon.

Dear Sir:

I have your letter dated March 29, 1930, file TR 382-N, relative to accounting for revenue assessed under the Zone Tariff, on fuel oil moving from Linnton to the Northern Pacific Terminal Company.

These cars of oil are billed to the Northern Pacific Terminal Company at a rate of $8.55 per car, which covers the placement of the load at the industry, and not only to a connecting line, as stated in your letter. Terminal Company power completes the delivery from setout track to the industry, which in this instance, is the Northern Pacific Terminal Company, fuel track, and the $8.55 in the published tariff is not earned until placement on our fuel track is made. In accordance with published tariff, the $8.55 should be divided between the carriers participating in the haul, and therefore, you should report to us 50% of the $8.55 as the line completing the delivery.

Yours truly,

Original signed by C. B. Shibell,
Comptroller.

Cc—John Miesbus,
General Yardmaster
Dict. CSB:JH [92]"

To this final appeal the Comptroller of the S. P. & S. acceded as shown by his letter of April 18, 1930, as follows: (Tr. 101)

"April 18, 1930.

Mr. C. B. Shibell, Comptroller,
The Northern Pacific Terminal Company,
Portland, Oregon.

Dear Sir:

SWITCHING CHARGES ON FUEL OIL FOR NORTHERN PACIFIC TERMINAL CO.

Replying to your letter of April 1st, File C 141, in regard to division of switching revenue on shipments of fuel oil consigned to the Northern Pacific Terminal Company:

If delivery of oil shipments to connections with your track does not complete the movement and the movement from such connections to unloading points involves an additional haul by the Northern Pacific Terminal Company, you will be entitled to 50% of the switching charge.

You have been charged $11.50 on a number of these shipments out of which your line has received $5.75 whereas the correct charges are $8.55 out of which your line received $4.28. This leaves an overcharge of $2.95 per car of which $1.47 is due from your line, leaving a net amount due of $1.47 per car.

Please advise if you will render audit bill against us to adjust these items or do you prefer to have it handled thru the Agent's accounts by corrections on the switching settlement statements.

Yours truly,

ROBT. CROSBIE.

HS J"

Apparently, however, the correction was not made for all of the shipments which had moved and on April 1, 1932, the Comptroller of the Terminal Company, again called the attention of the Comptroller of the S. P. & S. to the matter by letter of April 1, 1932, as follows: (Tr. 71)

"April 1st, 1932.

Mr. Robert Crosbie, Comptroller,
Spokane, Portland and Seattle Railway Co.
Portland, Oregon.

Dear Sir:

Please be referred to your letter dated April 18, 1930, file TR 382-N, relative to switching charges on fuel oil consigned to Northern Pacific Terminal Company.

Corrections of the switching charges as reported by your agent at Linnton, Oregon, on statements issued to January 1, 1930, were made on statements No. 8, 19, 20, 21 and 22, to the Northern Pacific Terminal Company, April, 1930 accounts, and refund of the overcharge in the switching rate was made to the Northern Pacific Terminal Company through our Bill Collectible No. 14687, May 1930 accounts.

Since this time a check was made of all freight settlements, which developed that switching charges were not corrected on switching settlement statements, of all fuel oil for the Northern Pacific Terminal Company moving from the Standard Oil Company's plant at Willbridge, Oregon, to the Northern Pacific Terminal Company's set out track at Guilds Lake, period February 1st, 1923, to December 31st, 1929. This would involve a reporting to the Northern Pacific Terminal Com-

pany of one-half of the zone rate of $8.55 per car, covering movement during that period.

Please advise if you will prepare settlement statement reporting this revenue to the Northern Pacific Terminal Company, or if it will be necessary for us to prepare a Bill Collectible versus the Spokane, Portland and Seattle Railway Company to recover our proportion of these switching charges.

Yours truly,

C. B. SHIBELL."

The Comptroller of the S. P. & S. then invoked the statute of limitations on the shipments by his letter of April 25, 1932, as follows: (Tr. 73)

"Portland, Oregon, File No. TR 382-N
April 25, 1932.

Mr. C. B. Shibell,
Comptroller,
Northern Pacific Terminal Company,
Portland, Oregon.

Switching Charges on Fuel Oil for Northern Pacific Terminal Company

Dear Sir:

Referring to your letter of April 1st, 1932, file 141V7 relative to adjustment of switching settlement statements in connection with fuel oil moving from Standard Oil Company's plant at Willbridge to the Northern Pacific Terminal Co. at Guilds Lake:

The statute of limitations on adjustment of state traffic is six years, all records previous to that time being destroyed, and this will be your

authority to render bill against the SP&S for your proportion of switching charges on all cars moving April, 1926, and subsequent thereof.

Yours truly,

ROBT. CROSBIE—EJB."

In this letter the Comptroller authorized settlement for a period of six years and authorized the delivery of a bill against the S. P. & S. for all cars moving April, 1926, and subsequent thereto. Later, however, the S. P. & S. attempted to invoke a shorter period of three years established by the Railroad Accounting Officers' Association and the S. P. & S. settled only for a period of three years. (Tr. 74-5.) However, the Terminal Company was not a member of the Railroad Accounting Officers' Association, had not subscribed to its rules and was not bound thereby. The witness Johnsrud claimed that because the Terminal Company stock was owned by the Oregon-Washington Railroad & Navigation Company, Northern Pacific Railway Company, and Southern Pacific Company, who were members of such association, that this limitation was binding on the Terminal Company. However, that hardly needs argument to refute. Certainly because a stockholder has subscribed to a certain agreement would not bind the company in which he owns stock.

The S. P. & S. did, however, collect and pay to the Terminal Company its proportion of the switching charges for a period of three years and this is part of the money sought to be recovered by the S. P. & S. in

this case and which the Court permitted the S. P. & S. to recover.

In none of this correspondence between the parties hereto was any contention made by the S. P. & S. that there was anything wrong with the manner in which the shipments had been billed. There is no intimation in the pleadings in this case that there was anything wrong in the billing. It was not until the testimony was taken that such contention was made.

As heretofore pointed out, both the interchange track and the track serving the oil storage tank are in Guilds Lake and being tracks north of Nicolai Street the rate was the same to each point. The S. P. & S. had joined in the tariff by which it published the fact that it, together with the Terminal Company, would transport shipments to either point at the rate of $8.55 per car. The contention is made that the Terminal Company should have seen that the destination as shown in the bill of lading was made to a particular track in the Guilds Lake. The Terminal Company, however, was not a party to the bill of lading. The bill of lading was that of the S. P. & S. The undertaking of the Standard Oil Company with the Terminal Company was that it would deliver the oil f. o. b. oil spur Guilds Lake. When the shipments were received by the S. P. & S. it issued its bill of lading to the Standard Oil Company. The Terminal Compay, as far as the record shows, and we believe in fact never saw any one of the bills of lading so issued by the S. P. & S. It knew that the rate applied not only to the interchange track but to the oil spur and all other tracks in Guilds Lake.

It could not make delivery on any track in the Guilds Lake district. It had no right to go into Guilds Lake for any purpose except to make an interchange with the Terminal Company for its further transportation, and that was by reason of the fact that the Terminal Company had designated a track in the make-up and break-up yard as the interchange track. If there was any doubt in the minds of the officers or agents of the S. P. & S. as to the exact track in Guilds Lake where the shipments were to be delivered it should have secured definite information on that point before accepting the delivery. The correspondence above quoted repeatedly told the S. P. & S. that the interchange track was not the destination and that the Terminal Company was performing additional service in transporting their cars to the oil spur. It knew that for the rate named it was obligated under the tariff to transport said shipments for delivery at any track within the Guilds Lake district. It did in fact have definite information and the bills of lading designated in the routing shown that the Terminal Company was to perform part of the transportation service. There was presented to the General Freight Agent Pickard of the S. P. & S. a copy of a bill of lading admittedly copy of one of the bills of lading on shipments involved in this case which read: "Consigned to The Northern Pacific Terminal Company, Guilds Lake, Portland, State of Oregon, Route S. P. & S.-N.P.T."

It was admitted that the initials "N. P. T." in the routing would normally designate that the Terminal Company was to participate in the transportation (Tr.

48) but the General Freight Agent maintained that in view of the fact that the destination was indicated as Guilds Lake the initials meant nothing to him. It should, however, have meant something to him because the same rate by the tariff entered into by the S. P. & S. applied to all tracks in Guilds Lake and none of them could be reached for delivery except through the transportation service of the Terminal Company. Therefore, with such designation upon the bill of lading, if there was any doubt in the agent's mind as to where the shipments were going and the bill of lading required a definite track to be designated he should have required the additional information and inserted it, as indicated by his testimony (Tr. 49) where he testified that if a shipment were consigned billed to the Southern Pacific, Portland, Oregon, with routing designated in the bill of lading S. P. & S.-NPT, if he were the agent he would not accept the shipment, but would ask for some point of delivery to be designated on the bill of lading.

In view of the fact that numerous tracks in Guilds Lake to all of which shipments could be made at the same rate if there was any doubt in the agent's mind, or if the S. P. & S. were unwilling to participate in shipments beyond the interchange point, where the routing showed that the NPT Co. was to be one of the participating carriers, then it was the duty according to the General Freight Agent's testimony to reject the shipment or seek further information as to the exact track to which delivery was to be made.

It is rather peculiar that with the tariff provisions as they are that the carrier issuing the bill of lading should have the right to say that the transportation should not extend beyond the interchange point.

But the S. P. & S. was left in no doubt certainly after August 18, 1926 when it received the letter (Tr. 60) that the shipments were not destined to the interchange track. These shipments were moving practically daily. After this knowledge they should, if they deemed it so essential, have corrected their bills of lading to conform with the information given them in that letter. They were so informed in fact as shown by the letter of November 24, 1926 to the S. P. & S. counsel asking information as to the rights of the S. P. & S. in the premises. The language in that letter leaves no doubt as to the knowledge of the S. P. & S. as to where these shipments were destined for it says (Tr. 78) "I would like your ruling on this for the reason that there are other movements of the same character involved, such as fuel oil * * * from Willbridge *to the N. P. terminal storage tracks in Guilds Lake which is within the same zone.*"

The General Freight Agent did not say simply to Guilds Lake or the interchange track but particularized that the shipments were going to the *storage tracks* in Guilds Lake. Therefore, with this specific knowledge as shown in this letter, if it were so material to designate the particular track the General Freight Agent of the Company to whom the matter had been referred should have seen that his agents who issued the bills of lading inserted the particular track. The bills of lading were the bills of that company, not of the

Terminal Company. The Terminal Company had nothing to do with the billing. With this knowledge in the possession of the General Freight Agent of the S. P. & S. it is hard to see why the Terminal Company should be penalized to the extent of some twelve or thirteen thousand dollars for the failure of the General Freight Agent to see that his station agent properly billed the shipments, on which that company made the contract of carriage.

We submit that the bills of lading were sufficient to require delivery at any point in Guilds Lake. The General Freight Agent of the S. P. & S. admitted that if the interchange point were outside of Guilds Lake the billing would be sufficient to permit the Terminal Company to participate in the revenue. (Tr. 59) Furthermore, the billing is sufficient to permit and require delivery at any point in Guilds Lake and the S. P. & S. should not have the right to say it should terminate short of any track in Guilds Lake under such billing. In billing shipments a particular track is ordinarily not designated and upon arriving inquiry is made of the consignee at what point he wants delivery. (Tr. 88-89) Counsel for the S. P. & S. in the lower court conceded that a shipment so billed to any other consignee except a carrier would be sufficient and would require delivery at any point in Guilds Lake, whether billed to a particular track or not. (Tr. 81 et seq.)

The fact that a carrier is the consignee should certainly not make any such distinction, especially in view of the knowledge on the part of all concerned as to the actual destination of the shipments, and that that des-

tination was within the term Guilds Lake as shown on the bill of lading.

It is significant that the shipments with reference to which the concession of counsel was made were shipments of fuel oil for company use from one of the oil companies at Linnton consigned simply to the "Northern Pacific Railway Company at Portland, Oregon, *no particular track being designated*" and inquiry was being made by the comptroller of the S. P. & S. as to the fact that they were being unloaded at Guilds Lake for the purpose of determining the rate applicable. Here were shipments of company material consigned to a carrier in which a particular track was not required to be designated in the billing. In fact simply the general designation of Portland was designated as the destination, (Tr. 81-2) and that the shipment was delivered at Guilds Lake and the Terminal Company participated in the revenue (Tr. p. 82).

Notwithstanding this knowledge on the part of the officers of the Company the matter was again called to the attention of the Comptroller of the S. P. & S. on March 20, 1930 and a number of letters interchanged between the officers of the two companies which were heretofore quoted. (Tr. 98-102). Yet with this additional correspondence and particular calling of the matter to the attention of the officers of the S. P. & S., the S. P. & S. the line issuing the bill of lading took no steps to change the billing to satisfy what it now maintains was necessary when it had within its power all of the information necessary to satisfy its contention and nowhere

claimed any responsibility on the part of the Terminal Company for changing said billing. After the letter of March 20, 1930 again insisting upon this right to participate, and again notifying the officers of the actual destination of the shipments, and especially after the concession of the S. P. & S. of the right of the Terminal Company to participate (letter of Crosbie, April 18, 1930), it is claimed and the court has permitted recovery for all shipments from March 20, 1930 up to March 28, 1932. Certainly if there was any duty on the part of anyone to see that the destination in the bills of lading was satisfactory to it that duty rested upon the carrier issuing the bills of lading and the Terminal Company should not be charged with any neglect or failure in this regard and this duty certainly obtained at all times from and after the letter of August 18, 1926 and especially after the knowledge of the actual destination of the shipments shown in the letter of Mr. Pickard to the S. P. & S. counsel in November, 1926. There was no difference in the character of the daily movement of these shipments from the beginning to the end, and full knowledge of the character thereof was in the possession of the S. P. & S.

Proposition of Law II

The essential nature of the shipment determines the character thereof and the mere insufficiency or incorrectness of billing does not affect the same. The Court will look to the essential character of the shipment intended by the party, irrespective of the billing.

Baltimore & Ohio S. W. v. Settle, 260 U. S. 166, 43 Sup. Ct. 28.

Western Oil Ref. Co. v. Lipscomb, 244 U. S. 346.

Ill. Cent. R. Co. v. De Fuentes, 136 U. S. 157.

Tuckerton R. Co. v. Penn. R. R. Co., 52 I C. C. 319.

Rates on Railroad Fuel and Other Coal, 36 I. C. C. 1.

We will contend under this proposition that at all times during the shipment in question, and especially since August 18, 1926, all parties intended and all parties knew that the shipments were destined to the oil storage tank of the appellant at Guilds Lake, and that that was the essential character of the shipments which should govern irrespective of the billing.

In the case of Baltimore & Ohio S. W. v. Settle, 260 U. S. 166, 43 S. Ct. 28, the United States Supreme Court had before it a case in which lumber was shipped interstate billed to the station of Oakley. Both the station of Oakley and Madisonville were within the city limits of Cincinnati, but the rates on lumber from southern points to Oakley plus the local intrastate rate from Oakley to Madisonville were less than the through interstate rate from southern points to Madisonville. The shipment in question was therefore billed to Oakley and possession taken at Oakley. Later a new billing and shipment was made from Oakley to Madisonville. The purpose, of course, was to get the benefit of the lower rate, but the Supreme Court held in substance that it was the intention of the shipper at all times to transport said shipment to Madisonville and that the

essential character of the shipment was therefore one from originating point to Madisonville, notwithstanding the original billing of same to Oakley. In the course of the opinion, the court quoting from 43 Sup. Ct. 30, says:

> "And whether the interstate or the intrastate tariff is applicable depends upon the essential character of the movement. That the contract between shipper and carrier does not necessarily determine the character was settled by a series of cases in which the subject received much consideration. (Citing numerous authorities.)
>
> "If the intention with which the shipment was made had been actually in issue, the fact that possession of the cars was taken by the shipper at Oakley, and that they were not rebilled for several days, would have justified the jury in finding that it was originally the intention to end the movement at Oakley, and that the rebilling to Madisonville was an afterthought. But the defendant Clephane admitted at the trial that it was intended from the beginning that the cars should go to Madisonville, and this fact was assumed in the instructions complained of. * * * Under these circumstances, the intention as it was carried out determined, as matter of law, the essential nature of the movement, and hence that the movement through to Madisonville was an interstate shipment; for neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk is an essential of a through interstate shipment. These are common incidents of a through shipment, and when the intention with which a shipment was made is in issue the presence, or absence, of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been

intended, these incidents are without legal significance as bearing on the character of the traffic."

As stated by the court this principle is established by a long line of authorities and is thoroughly shown by the other authorities cited above.

This same principle we submit is applicable here. Counsel lays too much stress upon the billing; the destination point of these shipments was Guilds Lake and the particular track is that at the oil storage tank and it was always intended by all parties that that was its destination and in fact all of the oil was so moved.

The oil was purchased for delivery at the fuel oil spur in Guilds Lake. We have developed fully and referred under the prior point to the fact that the S. P. & S. was fully advised of this fact, certainly from and after August 18, 1926. We maintain that there was no incorrect billing as the point of delivery was within Guilds Lake and if it required any more specific designation and destination in the bills of lading it was the duty of the S. P. & S., the carrier who issued the bill of lading, to properly bill it as it had at all times since August 18, 1926, full knowledge of where said shipments were moving and intended to move. The essential character of the shipments was from start to finish to this point in Guilds Lake, that it required the services of the Terminal Company in reaching that point, and under the law the Terminal Company was entitled to its share of the switching charge for such movement.

In order to justify the S. P. & S. in its claim that the shipments were completed at the interchange track,

why was not it its duty to particularize that track as the destination, if a definite track was required to be specified as now claimed by it? The oil spur, and any other track in Guilds Lake would fit the destination named in the bill of lading as fully as the interchange track insisted upon by the S. P. & S. as the destination. Why did it have the right to insist upon naming the point of destination within Guilds Lake, especially in view of the fact that during said shipments it was repeatedly informed that the interchange track was not the destination but the oil track was the destination and the intended destination of all such shipments—and it by its published tariffs had undertaken to transport by itself and connections all shipments tendered to that intended destination and had received the tariff charges for transportation to that destination?

Proposition of Law III

Estoppel

Where a party gives a reason for his conduct and decision touching anything involved in a controversy he cannot, after litigation has begun, change his ground and put his conduct upon a different basis. He is estopped from so doing.

Railway Co. v. McCarty, 96 U. S. 258, 267.
Davis v. Wakelee, 156 U. S. 689.
Oakland Sugar Mills v. Wolf Co. (C.C.A.) 118 Fed. 248.
Smith v. Boston Elevated R. Co., 184 Fed. 389.
Davis and Rankin Bldg. & Mfg. Co. v. Dix, 64 Fed. 406, 410, 411.

Lorane Mfg. Co. v. Oshinsky, 182 Fed. 407.
Southern Cotton Oil Co. v. Shelton, 220 Fed. 256.
Polson Logging Co. v. Neumeyer, 229 Fed. 707.

We have, without requoting the correspondence written by the parties hereto to each other, pointed out the fact that the S. P. & S. by its General Freight Agent by letter to the Comptroller of the Terminal Company dated August 26, 1926 (Tr. 61) declined to permit the Terminal Company to participate in the carrying charges on the ground that to do so would be a form of rebating and therefore illegal, that he had never withdrawn this basis of objection and that later the Comptroller had in fact on assurance of the Terminal Company that the shipments had actually moved to the oil track in Guilds Lake, permitted the Terminal Company for a period at the end of said shipments to participate in the revenues and had paid certain sums to the Terminal Company on that account but never during the entire controversy had the S. P. & S. placed its refusal upon any claimed insufficiency of the bill of lading. It had indeed placed its objection on other grounds. Under such circumstances the courts have held the party having taken a certain position in relation to a controversy before litigation starts cannot change the basis of such claim when litigation has started. Therefore, under this principle plaintiff should have been compelled to recover on the basis that to permit the Terminal Company to participate in the charges would amount to a rebating and therefore illegal. Having made no objection during the controversy on any

other ground, and especially having made no objection on the basis of insufficient billing, especially in view of the fact that such billing was its own duty, it should be estopped now to change the basis of its objection and recover on the ground that the billing required a specific track in Guilds Lake to be designated as the destination.

Railway Co. v. McCarthy, 96 U. S. 258, was an action for recovery of damages for injury to shipment of livestock. One of the grounds was delay in shipment. On arrival of the shipment at a certain station for further transportation over the line of another carrier the cars for said shipment were not ready and the ground for such delay was at the time given on account of lack of cars to transport the cattle. When the case was brought the carrier took the position that the day on which cattle should have been shipped was Sunday and that the Sunday law prevented such shipment on that day. With reference to this question the Court, at page 267, says:

> "The question made by the company upon the Sunday law of West Virginia does not, in our view, arise in this case. We have already shown that the defendant proved upon the trial that it was impossible to forward the cattle on Sunday, for want of cars. And it is fairly to be presumed that no other reason was given for the refusal at that time. It does not appear that any thing was then said as to the illegality of such a shipment on the Sabbath. This point was an after-thought, suggested by the pressure and exigencies of the case.
>
> "Where a party gives a reason for his conduct and decision touching any thing involved in a con-

> troversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law." (Citing decisions.)

So in the present case the S. P. & S. at no time placed its refusal to recognize the Terminal Company as performing a part of the service on the ground that the wording of its own billing was insufficient to permit it to do so but did place it on the ground that such refusal was based upon the fact that to do so would be rebating and illegal. The position of the S. P. & S. comes exactly within the principle above quoted. It should be precluded now from raising said point because never taken until this litigation was started. If the position now taken by the S. P. & S. had ever been mentioned, there is no question that it would have speedily been changed. It should not be allowed to now react in favor of the S. P. & S. who could by its own billing have corrected it, if it was deemed by it essential. The McCarty case is a very largely quoted authority upon this principle. The other authorities cited under the proposition here discussed amply support the contention.

Additional Matters

There are certain additional matters which become material in the event of a reversal of this case. One is the question of the statute of limitations. The S. P. & S. has invoked against the plaintiff the limitation. First they invoked the six-year statute, later attempted to

invoke a three-year statute by rules of an accounting association to which association the defendant was not a member and hence not bound. The defendant claims that the method of accounting between the carriers constituted the accounting an open, mutual, current account and that therefore under the statute of limitations of Oregon the statute could not run except in the event of a break of a year between items. The defendant requested leave to present evidence on the nature of this account and the statute of limitations but the court denied such privilege, presumably on the basis that the decision would be in favor of the plaintiff and therefore not material. However, in the event of reversal we assume the case will be sent back, being a law action, and the defendant will have this opportunity to go into such question.

With reference to the question on the statute of limitations the plaintiff was claiming a limitation of but three years and refused to settle on the shipments paid for except for a period of three years and yet in the present case is seeking and has been permitted to recover for shipments moving more than three years prior to the commencement of the action. The complaint was filed September 20, 1933 (Tr. 2) and the shipments upon which recovery was permitted dated back to April 1, 1929. (See findings, Tr. 30). A rather inconsistent position.

We submit, therefore, that this case should be reversed on the grounds heretofore argued, to-wit: that the shipments were in fact from points on the line of the S. P. & S. to points on the line of the Terminal

Company and that the Terminal Company performed a transportation service in the course of the transportation of such shipments and was entitled to participate in the switching charge to the extent of receiving one-half thereof, and that the plaintiff is estopped on account of its conduct prior to litigation to claim any insufficiency in the billing and that said cause be remanded to the court below with the right in the plaintiff to retry the same on the basis of this court's decision and the right to offer testimony on the question of the character of the account between the parties hereto and show the number of shipments upon which it may be entitled to share in the freight charges.

Respectfully submitted,

JAMES G. WILSON,

JOHN F. REILLY,

~~Solicitors~~ Attorneys for Appellant.

No. 7771

In the

United States Circuit Court of Appeals

For the Ninth Circuit

THE NORTHERN PACIFIC TERMINAL COMPANY,
a corporation

Appellant

v.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY,
a corporation

Appellee

Upon Appeal from the United States District Court
for the District of Oregon.

BRIEF OF APPELLEE

CHARLES A. HART,
Attorney for Appellee.

CAREY, HART, SPENCER & McCULLOCH,
Of Counsel.

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No. 7771

In the

United States Circuit Court of Appeals

For the Ninth Circuit

THE NORTHERN PACIFIC TERMINAL COMPANY,
a corporation

Appellant

v.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY,
a corporation

Appellee

Upon Appeal from the United States District Court for the District of Oregon.

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellant, The Northern Pacific Terminal Company (to which we shall refer as the "Terminal Company"), was the consignee of a considerable number of oil shipments which moved over the railroad

of appellee, Spokane, Portland and Seattle Railway Company (to which we shall refer as the "Railway Company"). The Terminal Company is also a common carrier by railroad, with several miles of railroad trackage within the City of Portland. The oil shipments in question were delivered by the Railway Company to the Terminal Company at a point where their respective tracks connect, and the Terminal Company then hauled the shipments to the spur track at which the cars were unloaded.

The question in dispute involves this latter haul; the Railway Company contends that it delivered the shipments to the Terminal Company *as consignee*, and that the further transportation on the rails of the Terminal Company was nothing more than an intra-plant movement by the consignee; the contention of the Terminal Company is that (although it was the consignee of the shipments) the cars were accepted from the Railway Company for further common carrier transportation to the particular point of unloading. Upon this theory the Terminal Company claims the right to share, as a participating common carrier, in the tariff charges collected from it as consignee.

The entire transportation was within the corporate limits of the City of Portland. It was governed by so-called switching tariffs which imposed a flat rate per car from one zone in the city to another. The point of connection between the tracks of the two companies (at which the Terminal Company took possession of the cars) was in the same zone as the point at which the Terminal Company unloaded the cars. Hence no greater tariff charge would have been collectible if the movement to the point of unloading were considered a part of the common carrier service. Under an agreement made pursuant to the tariffs, carriers participating in an inter-zone haul were entitled to divide the tariff charges equally. Therefore, the Terminal Company's contention in result means that the Railway Company was required to pay back to the Terminal Company one-half of the tariff charges for the transportation service rendered.

The trial court rejected the Terminal Company's contention. No written opinion was filed, but there was a finding that the Terminal Company "was not a participating carrier and is not entitled under the applicable tariffs to a share in or a

division of the tariff charge covering said transportation service; . . ." The Railway Company (plaintiff in the court below), having theretofore paid the Terminal Company in the mistaken belief that the charges collected were subject to division, was given judgment for the amount thus erroneously paid.

ARGUMENT

Appellant's argument is addressed to the final conclusion of the trial court that the Terminal Company did not sustain the relation of participating common carrier to the oil shipments of which it was consignee. The assignments of error filed in the lower court, and the specification of errors in appellant's brief, raise other questions not going to the merits. Except for the question of estoppel (Specification of Error V) these are not argued separately. The brief explains that the record in the lower court was made "with a view to presenting and preserving the fundamental question . . ." (Appellant's Brief, pp. 12-c, 12-d).

Specifications of Error II, III and IV challenge the refusal of the court to make rulings on particular questions of law. (Appellant's Brief, pp.

12-a, 12-b, 12-c. Since no argument is made in support of these specifications, we shall assume they have been waived. This leaves for discussion the question whether the evidence is sufficient as a matter of law to sustain the findings and conclusions upon the merits, and the question of estoppel presented by Specification V.

Appellant advances three "Propositions of Law". The first two go to the merits; the third refers to the estoppel claimed. Shortly stated, the contention (upon the merits) is that the shipments were intended to go to a point on the Terminal Company's railroad beyond the junction with the Railway Company's line, and that this required common carrier service by the Terminal Company. The question is one of mixed law and fact dependent for its answer upon the particular facts involved; as appellant points out (Appellant's Brief, p. 14), the general principles stated in the "Propositions of Law" are not open to question.

The Right of a Common Carrier to Share in Tariff Charges Paid by it as Consignee is of Necessity Narrowly Restricted.

Before discussing the facts, it may serve a useful purpose to point out the limitations which are

necessarily attached to the right sought to be exercised by the Terminal Company. Undoubtedly a common carrier has an option with respect to shipments of which it is the consignee and which are intended to be moved to a destination beyond the point where the shipments are received from the connecting line. It may take delivery as consignee at the junction with the connecting line, or it may provide for common carrier transportation over its own line as well, to the point of final destination. The advantage may be one way or the other; the through rate to the final destination may be substantially greater than the rate to the junction point, and the division or share of the rate which would come to the consignee as a participating carrier may not be large enough to offset this difference, in which case the consignee carrier would be better off to take delivery as consignee at the junction point; or, on the other hand, the rate to the final destination may not be much in excess of that applicable to the junction point, in which case the right to share as a connecting carrier in the through rate may make it more advantageous to defer taking delivery as consignee until the shipment reaches its final destination. The follow-

ing illustration will make this clear:

The Southern Pacific operates a line of railroad from San Francisco to Ogden, where it connects with the Union Pacific. In making purchases of material at Chicago for use at San Francisco, the Southern Pacific has the option to have the shipments billed through from Chicago to San Francisco at the through rate applicable to such a movement, the Southern Pacific taking a share or "division" of the tariff charges fixed by agreement between the two lines; or, if there is a substantial difference between the Chicago-Ogden rate and the Chicago-San Francisco rate, not offset by the division or share which would go to the Southern Pacific, it could have the shipments billed to itself at Ogden, taking delivery as consignee there. If this were done, only the tariff charge from Chicago to Ogden would be collected, the shipments being transported from Ogden to San Francisco as company material not subject to any tariff charge.

It became obvious, however, quite early in the history of railroad rate regulation, that this option provided a comparatively simple means of evading tariff provisions. Shipments intended for use at or near the junction with the connecting carrier, and

which were not to be moved at all on the rails of the consignee carrier, were given a fictitious destination beyond the junction point, and the through rate applied, the consignee carrier being given the share of that rate fixed by the prevailing division agreement. This in effect was nothing less than a rebate of part of the charges paid for transportation from the point of origin to the point at which the shipments reached the line of the consignee carrier.

To meet this situation the Interstate Commerce Commission in 1908 adopted the following ruling (italics ours):

> "A carrier, or a person or corporation operating a railroad or other transportation line, may not, as a shipper over the lines of another carrier, be given any preference in the application of tariff rates on interstate shipments, but it may lawfully and properly take advantage of legal tariff joint rates applying to a convenient junction or other point on its own line, *provided such shipments are consigned through to such point from point of origin and are, in good faith, sent to such billed destination.*"

This conference ruling was adhered to by the Commission when challenged in formal proceedings. *In the Matter of Restricted Rates,* 20 I. C. C.

426, *Tuckerton Railroad Co. v. Pennsylvania Railroad Co.,* 52 I. C. C. 319.

The limitation imposed by this ruling is that a carrier consignee can receive back a part of the tariff charges paid, only when it actually participates in the common carrier transportation service provided; and this means that the consignee carrier does not function as a participating common carrier with respect to the haul on its own line to the point of final destination, unless the shipments "are consigned through to such point from point of origin and are in good faith sent to such billed destination."

The Terminal Company's Shipments were not Consigned Through to a Destination on its Line Beyond the Point at Which the Shipments were Received from the Railway Company.

All of the shipments involved in this action were billed to the Terminal Company at "Guild's Lake"; and it is not disputed that the Terminal Company's properties at Guild's Lake included the trackage upon which cars were placed by the Railway Company when delivery to the Terminal Company was intended. The bills of lading, which stated the contract for common carrier transpor-

tation service between the Terminal Company's shipper and the Railway Company, provided for the movement of the cars from Willbridge or Linnton (the shipping points) to Guild's Lake, at which place delivery was to be made to the Terminal Company.

It would seem quite clear that shipments thus billed were not consigned through to a point on the Terminal Company's line so that common carrier transportation on the railway of the Terminal Company can be said to have been intended and contracted for. All of the transportation service called for by the bills of lading was provided by the Railway Company when it placed the cars in the possession of the Terminal Company upon the interchange tracks at Guild's Lake.

The Terminal Company's chief contention seems to be that the shipments when made were intended to go to the fuel oil spur of the Terminal Company and were not to stop at the interchange track. It is said that this determined the "essential character" of the shipments, and that this governs, irrespective of the billing, under the rule applied by the Supreme Court in distinguishing between interstate and intrastate transportion. See *Balti-*

more & Ohio Southwestern Railroad Co. v. Settle, 260 U. S. 166.

This argument overlooks the fact that the shipments were consigned to a common carrier which had the right to take delivery either at the point of interchange with the common carrier, or at the final destination on its own line. The fact that the oil was purchased for delivery at the oil spur of the Terminal Company, whether known to the Railway Company or not, is of itself of no significance. The intention to have the cars go to this final destination indicated nothing as to the character of the transportation service to be accorded the shipments after they came into the possession of the Terminal Company. When the shipments were made, *but not thereafter,* the Terminal Company had a choice as to this; it could have directed its shipper to designate as the destination of the common carrier transportation, either the place at which the cars would reach the rails of the Terminal Company, or the point on those rails to which the cars were ultimately to go.

The choice of the first alternative meant an intraplant movement or company material haul, on the Terminal Company's line, from the point of

interchange to the fuel oil spur; the other meant common carrier transportation through to the oil spur. In either case the cars would be hauled by rail to the Terminal Company's oil spur, in accordance with the asserted intention that the oil was purchased for delivery at the oil spur.

The option of the Terminal Company was exercised when its shipper consigned the cars to the Terminal Company at Guild's Lake, without providing for any common carrier transportation service to some point on the line of the Terminal Company. This fixed the "essential character" of the transportation service, so far as the movement on the Terminal Company's railroad was concerned. Common carrier service beyond the junction point was not intended or provided for.

The decisions of the Commission to which we have referred leave no room for doubt that a carrier consignee must provide in advance for consignment of its shipments to some point on its own line beyond the point of interchange with the connecting carrier if it is to share in the tariff charges paid. The reason for this is obvious. Without this restriction, and with no obligation to supply any common carrier service beyond the point

of interchange, the shipments could be disposed of in any way desired (perhaps with no transportation service at all on the tracks of the consignee), and the consignee left free to claim a division of the tariff charges paid.

Here the bills of lading imposed no obligation upon the Terminal Company to provide any common carrier service whatsoever, after the cars came into its possession at the Guild's Lake interchange track. It was free to move the cars about its plant as might be desired. But any such movement, whether to the fuel oil spur or elsewhere, would be an intraplant or company material haul, not subject to published tariffs and not a part of the common carrier service called for by the bills of lading.

We understand appellant to contend also that in any event the oil shipments were in effect consigned through to the fuel oil spur at which the cars were unloaded. In support of this contention, appellant argues, (1) that since the fuel oil spur is located within the Guild's Lake yard of the Terminal Company, the designation of Guild's Lake as the place of delivery was sufficient to

require common carrier transportation to any location within the yard, and (2) that there were no unloading facilities at the interchange track, hence a consignment to "Guild's Lake" meant transportation to some point of unloading therein.

(1) Appellant's argument here is that the consignment of a shipment to an industry which has a spur track, need not specify the particular spur track location in the bill of lading. A shipment billed to such an industry at Portland or San Francisco, with no more specific designation of the place of delivery, would be entitled to transportation to the delivery or unloading track of the consignee.

This argument ignores the distinction between the ordinary commercial shipment and one made to a common carrier as consignee owning or operating trackage over which the shipment is to move. There are industries located on spur or side tracks of the Terminal Company in the Guild's Lake district; shipments billed to them at "Guild's Lake" obviously are entitled to common carrier transportation by the Terminal Company (from the interchange track to the place of delivery) without any designation in the bill of lading of the particular point of unloading. Here the shipments

were billed to a common carrier which had the right to take delivery *as consignee* at the point of interchange with the connecting carrier. This right would normally be exercised, because some saving in freight charges would result. But there are instances, such as that here involved, where the saving is the other way. By continuing the common carrier service to the final destination a very substantial share of the tariff charges could be gotten back. To make this possible, however, consignment through to some delivery point on the line of the consignee is essential, as is made clear by the decisions of the Commission cited. This was not accomplished by bills of lading which designated no such delivery point, but which permitted the consignee to take delivery at once when the shipments reached its rails.

It should be noted, too, that the transportation service here involved although referred to as switching service, is not the same as the switching service incident to the delivery of a shipment coming from a point outside of the city where a so-called line haul is involved. The transportation of the Terminal Company's oil cars under the switching tariff, Exhibit 2, was the equivalent of

drayage service; that is, it involved the movement of commodities from one point in the city to another. Under the provisions of the tariff, shippers applied for and procured the transportation of carload shipments from a point in one zone either to another point in the same zone or to a point in another zone, all within Portland terminals. The same industry may have warehouses or plants in different zones or at different locations in the same zone; the tariff, Exhibit 2, has a list of industries in different zones with the locations of their several delivery tracks specified. It would ordinarily be necessary, therefore, to have the bills of lading covering switching service of this kind specify the precise point of delivery.

The absence of any such designation in the bills of lading here involved was therefore significant; the billing plainly indicated that the Terminal Company was to take possession of the shipments as consignee when the shipments were turned over to it by the Railway Company at "Guild's Lake," the destination named in the bills of lading.

(2) The argument that because there were no unloading facilities at the interchange track fur-

ther transportation service on the line of the Terminal Company was intended, similarly ignores the considerations upon which the right of a carrier consignee to share in the tariff charges is based. Of course, further movement of the oil cars from the interchange track to the point of unloading was intended, but the question here involved turns upon the character of that transportation service, whether common carrier service or deadhead company haul.

The Terminal Company was entitled to take possession of the oil cars as consignee when the cars were delivered to it by the Railway Company at the interchange track, wherever it proposed thereafter to unload the cars. Bills of lading covering the shipments in question provided for such delivery; in the circumstances the lack of unloading facilities at the interchange track does not touch the question of delivery to the Terminal Company as consignee.

Delivery of the Shipments by the Railway Company to the Terminal Company as Consignee and not as Connecting Carrier was Acquiesced in by the Terminal Company for Approximately Seven Years.

There were no formalities attendant upon the transfer of possession of the shipments of fuel oil

involved, from the Railway Company to the Terminal Company, by which it could be determined at once whether or not the Terminal Company received the cars in its capacity as consignee. The method of transfer would have been the same, whether additional common carrier service was contemplated, or whether the cars were to be thereafter moved as company material.

But from the beginning of this transportation service in 1923 to the end of 1929, when the point of shipment was changed from Willbridge to Linnton, the Railway Company consistently treated the shipments as delivered to the consignee when they were placed on the interchange track at Guild's Lake. The Terminal Company acquiesced in this and no division or share of the tariff charges was turned back to the Terminal Company. All question as to this had apparently been definitely settled when, in early 1930, after the Linnton-Guild's Lake transportation had started, a series of misunderstandings led to the allowance of divisions on shipments moving in the ensuing two years. But for this error it is safe to say that the Terminal Company would have continued its acceptance of the shipments as consignee, and the question

here presented would never have arisen.

The oil shipments involved began in 1923 and continued to 1932. The demand for a share in the tariff charges was first made in 1926, when the comptroller of the Terminal Company wrote to the local agent of the Railway Company as follows (Transcript, pp. 60-61):

> "Upon investigation of cars delivered by S. P. & S. Ry. to Nor. Pac. Terminal Company of fuel oil, billed to N. P. T. Co., we find all the revenue is absorbed by the S. P. & S. Ry. We think this practice is wrong as under the switching tariff the Nor. Pac. Terminal Co. should get 50% of this revenue.
>
> . . . . . .
>
> "It is manifestly evident that the Terminal Company performs a part of the switching after receiving the cars from you, also in delivering the empty cars back to your yard. Under the arrangement of the zone switching tariff, we are entitled to 50% of the revenue where two companies participate in the switching."

The Railway Company answered, refusing to comply with this demand, explaining that to comply "would be nothing more or less than a modified form of rebating." (Transcript, p. 62.)

This explanation was accepted by the Terminal Company and no further claim was made that the Terminal Company was a participating common

carrier in the movement of this fuel oil in the ensuing three years. The Terminal Company's witness explains this inaction as follows (Transcript, pp. 102-103):

> "My predecessor was E. L. Brown, who was the comptroller of the Terminal Company for about fifty years. I do not blame Mr. Brown, but rather myself, as handling this matter rather poorly because I was in active charge of the accounting at the time. Up until 1926 we rather passed the explanation of Mr. Pickard with regard to the division of the switching revenue. The S. P. & S. having declined our demand of 1926 we did nothing about it until 1930. The movement continued from Willbridge right through until 1930 and we continued to accept the accounting of the S. P. & S. in the meantime."

This acquiescence for so many years in the Railway Company's decision that, as the shipments were consigned, the Terminal Company took possession of them at the interchange track as consignee and not for the purpose of further common carrier transportation, makes impossible the contention urged by the Terminal Company here. Specific advice was given by the Railway Company in 1926 that it considered the common carrier transportation ended at the interchange track. The Terminal Company could thereupon have directed

its shipper to consign the fuel oil to a particular point on the tracks of the Terminal Company, beyond the interchange track, in order to make the Terminal Company a participating carrier. This was not done; the Terminal Company did not bring itself within the rulings of the Interstate Commerce Commission, either as to the shipments subsequent to 1926 or as to those before. It is too late now to say that without through consignment to a point beyond the interchange track the Terminal Company took possession of the shipments in its capacity as common carrier and not as consignee.

The subsequent allowance to the Terminal Company from 1930 to 1932 of a division of the tariff charges on shipments from Linnton to Guild's Lake (which allowance the Railway Company is seeking to recover from the Terminal Company herein), came about in the following way:

When the movement from Linnton began, the agent at that point mistakenly assumed that the place of delivery was in zone 1 instead of zone 5. This meant an inter-zone haul partly on the tracks of the Terminal Company. The shipments were

billed accordingly, the rate applied being $11.50 per car (instead of the intra-zone rate of $8.55 per car), and the Terminal Company was permitted to share in the revenue as a participating common carrier. (Transcript, pp. 98-100.) On March 20, 1930, the comptroller of the Terminal Company wrote to the Railway Company's agent at Linnton calling attention to his error. The letter said (Transcript, p. 98):

> ". . . The N. P. Terminal Co. plant, where this fuel oil is unloaded, is located at Guilds Lake Yard in Zone 5 and the rate of $8.55, applicable to an exclusive zone 5 switch movement should be charged, with an equal division of the revenue between the N. P. T. Co. and the S. P. & S. Ry. Co."

The comptroller of the Railway Company answered this letter admitting that the rate applicable was $8.55 per car and not $11.50 per car. As to the claim for a share in the revenue, the following statement was made (Transcript, p. 99):

> "It is our understanding that these shipments are billed to connection with your line at Guild's Lake and should be handled on S. P. & S. local switching settlement statements, your line not participating in the haul."

The Terminal Company's comptroller answered on April 1, 1930, asserting that his Company par-

ticipated in the transportation covered by the tariff (Transcript, pp. 100-101), whereupon the comptroller of the Railway Company wrote the Terminal Company as follows (Transcript, p. 102):

> "If delivery of oil shipments to connections with your track does not complete the movement and the movement from such connections to unloading points involves an additional haul by the Northern Pacific Terminal Company, you will be entitled to 50% of the switching charge."

From this time on (April 18, 1930), the Railway Company accounted to the Terminal Company for one-half of the charges collected on these Linnton-Guild's Lake shipments. Two years later the Terminal Company made a demand for repayment of one-half of the charges collected on shipments which had been made from Willbridge prior to the year 1930. (Defendant's Exhibit E. Transcript, pp. 71-72.) The accounting department of the Railway Company agreed that an adjustment was due, but took the position that under limitations imposed by rules of the Railroad Accounting Officers Association the adjustment could not go farther back than April 1, 1929. The Railway Company thereupon paid over to the Terminal Company one-half of the charges collected on shipments from Will-

bridge between April 1, 1929, and December 31, 1929. (Transcript, pp. 73-76.)

This reversal by the accounting department of the Railway Company of the position taken in 1926, and acquiesced in by the Terminal Company until 1930, mistakenly assumed that the shipments were given common carrier transportation between the point of interchange and the point of unloading on the spur track of the Terminal Company. (Transcript, pp. 69, 101, 102.) Upon this assumption the accounting department of the Railway Company applied a ruling made some time before by counsel for the Railway Company upon a demand of the Portland Electric Power Company (also a common carrier by rail) to share in tariff charges where shipments had been billed to a point on the line of that company *beyond the point of connection at which possession of the shipments was taken.* The following quotation from the opinion of the Railway Company's counsel shows that it was based specifically upon the fact that the shipments to which it referred were billed to a destination upon the line of the Power Company beyond the point of interchange with the connecting line (Transcript, pp. 79-80):

"Ordinarily it is to the interest of a carrier which is also the consignee of a shipment, to fix the first junction point with the connecting carrier as the bill of lading destination so as to avoid the imposition of commercial freight rates for the full haul. In this case the advantage is the other way but we see no way of compelling the Portland Company to bill the shipment to the point of connection instead of its actual destination."

In March, 1933, the accounting department of the Railway Company discovered its error. Bills were thereupon rendered the Terminal Company for all of the division allowances theretofore made. (Transcript, p. 70.) Upon the refusal of the Terminal Company to pay these bills, this action was brought.

It is impossible to harmonize the acquiescence of the Terminal Company from 1923 to 1930 in the Railway Company's interpretation of the bills of lading covering the Willbridge-Guild's Lake shipments, with the renewal in March, 1930, of the contention that the movement of the oil cars from the interchange track to the unloading spur was part of the common carrier transportation service contracted for. Apparently the Terminal Company's comptroller thought he saw an opportunity to revive the claim in the error of the Railway

Company's agent at Linnton, when shipments from that point began. His letter (Transcript, p. 98) made no reference to the Railway Company's disposition of the question when he raised it in 1926. He merely called attention to the error in the rate, and added that his Company was entitled to "an equal division of the revenue," and the comptroller of the Railway Company, apparently ignorant of the fact that the General Freight Agent of his Company had refused a similar demand in 1926, answered that if an additional haul on the Terminal Company tracks was involved, the contract provision for an equal division of the charges would be applicable.

What these two Companies did in respect of the division of the tariff charges covering the oil shipments in question, is, of course, not controlling. If the Terminal Company in fact participated in the common carrier transportation service provided, it is entitled to a share in the revenue. If not, any division or refund of part of the charges collected would be an unlawful rebate. The practical construction given the bills of lading, and of the common carrier obligation assumed thereunder, is of importance, however, in determining the ques-

tion of fact involved, that is, whether the Terminal Company hauled the cars of oil, from the interchange track to its oil spur, as freight in its possession as a common carrier, or as company-owned material being moved from one point to another in its yard.

For seven years the parties were in agreement as to this. The question had been raised by the Terminal Company and the contention advanced that it was entitled to share in the tariff charges paid. The Railway Company answered that the Terminal Company was not a participant in the common carrier transportation covered by the tariff, and the Terminal Company accepted the answer. With the disputed issue clearly understood, the parties came to an agreement as to its disposition.

The events subsequent to this seven-year period form a decided contrast. In 1930 the Railway Company began allowing the divisions as to shipments from Linnton, because of an error on the part of the local agent. When this error was corrected the divisions were continued upon the assurance to the Railway Company's comptroller that through service to the unloading point was still involved.

In 1932 the Terminal Company applied for and received, upon the same assurance, a payment of divisions covering 1929 shipments (from Willbridge) within the limitation period thought applicable. In 1933 the Railway Company discovered its error and demanded the return of all divisions paid.

The Railway Company allowed these divisions for a time through a misapprehension of the facts. The Terminal Company, on the other hand, acquiesced in the refusal to pay them, during the earlier seven-year period, after a specific statement that the transportation service called for by the bills of lading ended when the shipments were delivered to the Terminal Company, the consignee, at the interchange track. Appellee submits that the practical construction given the rights and obligations of the two Companies during the ten years in which these shipments moved, confirms the conclusion adopted by the trial court; the Terminal Company took delivery of the shipments as consignee at the interchange track, and moved them from one point to another in its yard as company material. There was no participation in the common carrier transportation service covered by the

tariff, and the Railway Company could not lawfully repay to the Terminal Company any part of the tariff charges collected.

The Railway Company's Position in this Litigation in no Sense Differs from that Stated in the Rejection of the Terminal Company's Demand in 1926.

Appellant's claim of estoppel is that the demand for a share of the tariff charges was rejected in 1926 because its allowance would have been a form of rebating, whereas the Railway Company's demand in this litigation, for the return of the divisions paid, is based upon the "claimed insufficiency of the bill of lading." (Appellant's Brief, p 45.)

Neither statement of the positions taken by the Railway Company is accurate or complete. The Terminal Company was told in 1926 that the fuel oil cars were delivered to the consignee when they were placed on the interchange track and that for this reason any division of the tariff charges would be a rebate. The complete statement of the General Freight Agent of the Railway Company is as follows (Transcript, pp. 61-62):

> "Inasmuch as these cars are consigned to the Terminal Company, in so far as the SP&S is concerned, when they are set by us on the

> interchange with your line we are no longer interested in what is done with them. Delivery has been made to the Terminal Company at the nearest point and to give you a refund through the subterfuge of permitting you to participate in the division by reason of your switching it from the interchange over to the roundhouse, it seems to me would be nothing more or less than a modified form of rebating, in view of the oft expressed opinion of the Interstate Commerce Commission that a carrier performing service for another carrier, as we are doing for you in this instance, must make the same charge against such other carrier as they would contemporaneously make against any other shipper or consignee."

The position taken by the Railway Company in this litigation is exactly the same. Return of the divisions heretofore paid is demanded because the Terminal Company took possession of the shipments at the interchange track as consignee, and the movement of the cars in its Guild's Lake yard was not a part of the common carrier transportation service for which the tariff charge was imposed. For this reason an allowance to the Terminal Company of a part of the charges collected would be an unlawful rebate.

It is true that this results from the manner in which the shipments were billed, and that under the ruling and the decisions of the Interstate Com-

merce Commission, the Terminal Company could have been considered a participating common carrier if the shipments had been billed to a delivery point on its line beyond the connection with the line of the Railway Company. But this does not mean, and the Railway Company does not here contend, that there was anything "wrong" (Appellant's Brief, p. 34) about the billing. The Terminal Company, or its consignor, had the option to direct the delivery of the oil cars at the interchange track or at a point beyond on the line of the Terminal Company; the former alternative was selected. Had the rate advantage been the other way, no doubt the Terminal Company would insist that this manner of billing was deliberately chosen, in order to make sure that the movement on its own line would not be subject to any tariff charge. Whether intended or not, the billing of shipments here involved called for delivery to the consignee at Guild's Lake where the tracks of the Railway Company and the Terminal Company connected, and did not call for any common carrier transportation beyond the connection. Hence, any allowance to the Terminal Company out of the tariff charges collected would in effect be a rebate. This

was the position of the Railway Company in 1926, and it is the position of the Railway Company in this litigation.

What has been said answers appellant's contention, frequently appearing in its brief (pp. 35, 36, 37, 38, 47), that the Railway Company is responsible if the bills of lading were not correctly prepared. As we have pointed out, there was nothing incorrect or insufficient in the designation of Guild's Lake as the destination of the shipments. Appellant persistently ignores the difference between shipments consigned to a common carrier (delivery of which may be taken at the interchange with the connecting line) and the ordinary commercial shipments which necessarily receive common carrier transportation to their final destination, and as to which the designation of a particular delivery or unloading point might be needed.

No such direction was necessary in the case of shipments consigned to the Terminal Company *unless* common carrier service upon the line of the Terminal Company was desired. The specification of "Guild's Lake" was sufficient since the consignee had its own railroad line and could take delivery where the tracks of the two Companies connected.

The Terminal Company can hardly deny that the manner of billing these shipments was within its control. Necessarily the Railway Company looked to the shipper for instructions as to the designation of the shipments, and the shipper necessarily obtained its information with respect to the delivery point desired, from the consignee, the Terminal Company. As far back as 1926 the Terminal Company had been advised specifically that shipments billed to it at Guild's Lake were not entitled to common carrier transportation beyond the interchange track at that place. If the Terminal Company wanted this changed, it could readily have instructed its consignor to bill the shipments through to the specific point of unloading upon its own line. This was not done; the Terminal Company did not take advantage of its right to participate in the common carrier transportation covered by the tariff and it cannot lawfully share in the tariff charges paid.

Appellee submits that the trial court's findings of fact and conclusions of law are correct and that the judgment in favor of appellee should be affirmed.

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No. 7771

United States
Circuit Court of Appeals
For the Ninth Circuit

THE NORTHERN PACIFIC TERMINAL COMPANY, a corporation,

Appellant,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a corporation,

Appellee.

Upon Appeal from the United States District Court for the District of Oregon

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Reply Brief of Appellant

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Reply Brief of Appellant

We deem it desirable that a few matters contended for in appellee's brief should be called to the court's attention.

On pages 10 and 11 it is stated that the Terminal Company's chief contention seems to be that the shipments, when made, were to go to the fuel oil spur of the Terminal and were not to stop at the interchange track, and counsel calls attention to one of the several cases referred to by appellant in its opening brief to the effect that the essential character of the shipments and not mere accidents of billing, determine the nature

of the shipment. Counsel refers to the fact that this was the rule applied by the Supreme Court "in distinguishing between interstate and intrastate transportation."

This same rule is relied upon, and followed, however by the Interstate Commerce Commission in determining the rates and divisions as between carriers with reference to company fuel. In "Rates on Railroad Fuel and other Coal", 36 I. C. C. at page 8, the Interstate Commerce Commission says:

> "It is well settled that the character and nature of the movement of the traffic, that is, whether the movement is a through or local movement and not the mere accidents of billing, determine the nature of the commerce and the rate applicable." (Quoting numerous authorities.)

The Commission further says:

> "Clearly the fuel coal here considered was at no time actually destined to the billed destinations such as Roebuck, Ellenboro, and Ridgeland, but was in fact destined to and intended for use at various points of consumption to which it was reconsigned and transported. * * * It follows that the joint through rates and divisions of the joint through rates applicable to the various points of *actual destination* were the proper rates and divisions to be applied." (Italics ours.)

All of the shipments in this case moving from the inception of the traffic to January 6, 1930, originated at the Standard Oil Company's plant in the territory within the City of Portland designated as Willbridge. The contract of purchase of the oil by the Terminal Company from the Standard Oil Company provided that it

was sold F. O. B. fuel oil spur, Guilds Lake, Portland, within switching Zone 5. (Tr. 96.) This fuel oil spur is within "Guilds Lake." That was the point to which the shipments were all destined, and the point to which they were actually transported. The Terminal Company had no proprietary interest in the oil until the shipments reached that point. Upon receiving the shipments from the Standard Oil Company the appellee collected the full charges from the Standard Oil Company, and the Standard Oil Company paid the S. P. & S. Railway Company full tariff charges to that point. For any failure of the S. P. & S. Railway Company to deliver at that point it would be liable to the Standard Oil Company for such failure. Furthermore the Standard Oil Company until said shipments did reach said point had the right of stoppage in transit or could divert said shipments to some other point. The Bill of Lading was sufficient to require delivery at the oil spur for the oil spur is as much within Guilds Lake as the interchange track and as pointed out in our opening brief the S. P. & S. Railway Company had full knowledge of the actual destination thereof, as shown by Mr. Pickard's letter to Carey & Kerr, of November 24, 1926, wherein he states:

> "I would like your ruling on this for the reason that there are other movements of the same character involved, such as fuel oil * * * from Willbridge to the N. P. Terminal *storage tanks in Guilds Lake.*"

So that under the application of this ruling by the Interstate Commerce Commission the actual destination of the shipments, the point to which they were

actually moved, determines the character of the shipments, "the proper rates and divisions to be applied."

It is contended (Appellee's Brief, pg. 33) that the Terminal Company could have directed the Standard Oil Company to designate the particular track in Guilds Lake to which said shipments were to be delivered, in which event there would be no question of the right of the Terminal Company to participate in the revenue. The fact is the Terminal Company was not a party to the bill of lading and, as far as the record shows, and we believe in fact, the Terminal Company never saw a single bill of lading, or knew that such was in existence until after this action was commenced. There is no question that if the objection of the S. P. & S. was made on the basis of any insufficiency of the bills of lading the same could and would have been corrected but no such point was ever made until plans were being laid by the S. P. & S. to commence action against the Terminal Company, but the S. P. & S. was in fact, at all times, advised by the Terminal Company as to the track within Guilds Lake where said shipments were being made. It was a party to the bill of lading. The shipments were moving practically daily and it could and should, if it deemed the billing of so much importance, have seen to the correction of the same for it was fully advised of the actual destination of the shipments. Why should it therefore be necessary on the part of the Terminal Company to instruct the consignor when the bills of lading were those of the railway company which had been instructed in regard to this matter? This would seem to be an idle requirement

with this knowledge and direction in the possession of the railway company.

> "It is the duty of a common carrier to issue a bill of lading free from ambiguity or uncertainty." Gill-Andrew Lumber Co. v. Director General, 57 I. C. C. 493, 4.

ACQUIESCENCE OF THE TERMINAL COMPANY

Counsel for appellee lays considerable stress upon the claimed fact that the appellant acquiesced in the S. P. & S. interpretation of the billing. With this we take issue. There was no acquiescence for in every letter that was written on the subject it appears the Terminal Company was maintaining its position that it was performing a common carrier service in connection with the shipments. At the same time the letters of the S. P. & S. at no time claimed any insufficiency of the bills of lading to permit delivery at the oil spur. In fact their whole correspondence recognized the fact that such shipments were being transported to the oil spur in Guilds Lake. How can the Terminal Company be charged with acquiescence when the correspondence of the S. P. & S. disclosed no claimed insufficiency in the billing?

Ordinarily the railroads are able to compose their differences without legal proceedings and the only basis upon which such acquiescence could be claimed was that the Terminal Company did not actually commence action to recover its portion of the charges for on each and every occasion shown by the record the Terminal Company was asserting its right to the revenue. As

far as the shipments up to January 6, 1930, are concerned, being prepaid, the money was collected by the S. P. & S. from the Standard Oil Company. It got this money into its treasury and refused to pay any portion of the same to the Terminal Company although the Terminal Company was insisting at all times that it was entitled to a portion thereof. When, however, the Terminal Company started to secure its supply of fuel oil from the Richfield Company the oil was sold f. o. b. the Richfield plant in which case the Terminal Company paid the transportation charge. The money for the transportation of these shipments was in the Terminal Company's treasury, and, in line with the assertion of its rights, it paid to the S. P. & S. only the latter's share of the switching charge. The testimony of J. A. Johnsrud, Chief Clerk of traffic accounts is illuminating (Tr. 83-84), it is as follows:

> "On all shipments at [that] originated from the Richfield Oil Company, which shipments commenced on January 6, 1930, the Terminal Company paid the freight and was allowed to retain fifty per cent of the switching charge.
>
> On the shipments from the Standard Oil Company, which were prepaid, the S. P. & S. agent collected the money, the *S. P. & S. had the money and refused to give any of it to the Terminal Company.*
>
> On shipments from the Richfield Oil Company the shipments were not prepaid, the Terminal Company paid the freight *and retained one-half the charge."* (Italics ours.)

In other words each company in maintaining its position with reference to this controversy when it got

the freight money into its pocket refused to pay or account to the other for any part thereof, except upon the basis which the one collecting the money maintained was the proper basis of the division of the revenue. The discussion therefore in appellee's brief as to the S. P. & S. after January, 1930, paying the Terminal Company a portion of the revenue, through misconstruction of its counsel's ruling, is hardly the fact. Each company which had the money in its pocket was holding it in reliance upon its interpretation of its rights. If this be acquiescence, and if acquiescence is to determine the interpretation of the parties' rights, then, from January 6, 1930, to commencement of this action, on September 20, 1933, the S. P. & S. acquiesced in the Terminal Company's position by the same token that the Terminal Company acquiesced in the S. P. & S. interpretation prior thereto, for it did no more during that period than the Terminal Company did in the prior period, assert by letter and bill, its right to the revenue. We do not think, however, that this was acquiescence on the part of Terminal Company. The S. P. & S. Company's acquiescence in the Terminal Company's contention was complete for it specifically acquiesced in writing. (Letter of April 13, 1930, from Robert Crosbie, Comptroller of the S. P. & S. to C. B. Shibell, Comptroller, The Northern Pacific Terminal Company, Tr. 101-2), and paid the Terminal Company for a three-year period with full knowledge of the claim and the basis of the claim of the Terminal Company.

We respectfully submit that the record in this case shows that the shipments in question were in fact ship-

ments from originating point to the oil spur in Guilds Lake, were actually transported to said point, and were intended, and known to be intended for that destination at all times, and by all parties, and that actual destination determines the true character of the shipments, and that the Terminal Company is entitled to its divisions upon that character of shipment.

Respectfully submitted,

JOHN F. REILLY,

JAMES G. WILSON,

Attorneys for Appellant.

No. 7771

United States
Circuit Court of Appeals
For the Ninth Circuit

THE NORTHERN PACIFIC TERMINAL COMPANY OF OREGON, a corporation,
Appellant,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a corporation,
Appellee.

On Appeal from the District Court of the United States for the District of Oregon.

Appellant's Petition for Rehearing

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FILED
DEC - 9 1935
PAUL P. O'BRIEN,

HOUGHTON-CARSON COMPANY, PRINTERS, PORTLAND, OREGON

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On Appeal from the District Court of the United States for the District of Oregon.

Appellant's Petition for Rehearing

To the Honorable Curtis D. Wilbur, William Denman, and Bert E. Haney, Judges of the Circuit Court of Appeals for the Ninth Circuit:

The Northern Pacific Terminal Company of Oregon, appellant, hereby petitions this Honorable Court for a rehearing of this cause upon the ground that the Court, while recognizing the principle of law involved, has misapplied the same to the facts in this case, in that

(1). It has assumed that the appellant had control

of the shipments at all times and could direct or change the destination thereof. This is not the fact and particularly with reference to the Standard Oil Company shipments which were made by the Standard Oil Company on contracts of sale of the oil for delivery f. o. b. oil spur Guilds Lake.

(2). That the Court has misapplied the law in finding and determining that under the wording of the bill of lading it was the intention of the parties that delivery should be made at the interchange track at Guilds Lake instead of the oil spur track at Guilds Lake and has determined that there was some duty on the part of the appellee to exercise an option in some manner not done, notwithstanding the appellant had taken every means to notify the appellee of the intention to deliver, and the fact that the same were actually delivered, to the oil spur at Guilds Lake.

Respectfully submitted,

JOHN F. REILLY,

JAMES G. WILSON,

Attorneys for Appellant.

CERTIFICATE OF COUNSEL

The undersigned counsel for appellant in the above entitled cause does hereby certify that in his judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

JAMES G. WILSON,

Counsel for Appellant.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING

Throughout the opinion of this court it is assumed and held that the appellant had at all times control of the shipments so that it could terminate the shipment at any point it saw fit. On page 5 of the printed opinion it is said:

> "The billing in this case becomes important evidence as to *where defendant intended* the common carrier movement to end for the *defendant* could easily have prevented any uncertainty by requiring the billings to designate the unloading track at Guilds Lake. Under the circumstances as here shown it was *defendant's duty* to clearly indicate its intention as to where the common carrier transportation was to end and not permit any speculation in this regard."

While it is true that plaintiff's complaint alleged that the plaintiff had recevied the shipments from the defendant as *consignor* (Tr. 3, Par. IV, P. 4, Par. VI, P. 5, Par. VIII) its proof failed to sustain such allegation but the evidence showed that plaintiff did not receive a single shipment from defendant as *consignor* but did in fact receive the shipments up to January 6, 1930, from the Standard Oil Company as consignor, and on the shipments subsequent to January 6, 1930, from the Richfield Oil Company as consignor. (Tr. 48, 68.)

The defendant was in no case a party to the transportation contracts. In fact, it never saw the bills of lading until this action was commenced. Did not know of any claimed insufficiency in the bills of lading. It

had nothing whatever to do with the bills of lading or knew how the shipments were billed. The plaintiff, however, was a party to the bills of lading, had been repeatedly told what the destination of the shipments was, knew that they were destined to the oil spur track and being moved to the oil spur track as shown by the letter of R. W. Pickard, to Carey & Kerr, November 24, 1926 (Tr. 78), where it is stated that movements were being made "from Willbridge to the *N. P. terminal storage tank in Guilds Lake.*"

It is made the duty by statute, both with reference to interstate shipments (Sec. 20-11, Interstate Commerce Act) and in Oregon intrastate shipments (Oregon Laws, 1930, Sec. 62-2101) for the initial carrier to issue a receipt or bill of lading. This duty has been interpreted to require the initial carrier to issue a bill of lading free from ambiguity and uncertainty. Gill-Andrew Lumber Co. v. Director General, 57 I. C. C. 493, 494. In connection with these statutes, in both the Interstate Commerce Act and in the Act of Oregon, the initial carrier is obligated to the consignor on joint shipments to the point of final delivery. This is especially important in connection with the Standard Oil shipments in view of the fact, as hereinafter more particularly pointed out, the title to the oil, the right of diversion, and the right of stoppage in transit obtained in the Standard Oil Company up until the shipments reached the oil spur in Guilds Lake.

The S. P & S., with full knowledge of where the shipments were going issued its bill of lading, and if something more was necessary to be shown on the bill

of lading it was the duty of the S. P. & S. to so designate it for it was a party to the bills of lading and not the Terminal Company, and it had the requisite knowledge, whereas the Terminal Company never saw the bills of lading and was not a party thereto. This court however notwithstanding these facts has cast, contrary to the statute and the decisions, this duty upon the defendant. In this we submit the court was in error.

The court has also treated this oil as being owned by the defendant during transportation. This is not supported by the evidence with reference to the Standard Oil Company shipments. The contract of purchase of the oil between the Terminal Company and the Standard Oil Company provided that the oil was sold by the Standard Oil Company to the Terminal Company f. o. b. fuel oil spur Guilds Lake, Portland. (Tr. 96.) It was therefore the obligation of the Standard Oil Company to deliver said oil at the oil spur at Guilds Lake. It could do so in any manner it saw fit. Of course, the cheapest method was by the rail carriers of which the Terminal Company was one and it chose this method.

The general freight agent of the plaintiff defined the words "company material" as follows:

> "The phrase 'company material' is applied to commodities that are owned by one of the companies participating in the transportation of them." (Tr. 41.)

The Terminal Company did not own any of the oil shipped by the Standard Oil Company until it reached the oil spur at Guilds Lake. Therefore, the oil did not

become "company material" until it arrived at that spur. The Terminal Company could not therefore elect to take deliverey as suggested in the court's opinion until the oil reached that spur, for it was the property of the Standard Oil Company at all times up to that point. Contracts of shipment, that is, the bills of lading, were made by and between the Standard Oil Company and the S. P. & S. The Standard Oil Company retained the bills of lading as owner, as it should. In the event of accident or destruction or loss of the shipment prior to reaching the oil spur, the Standard Oil Company and not the Terminal Company would have the right to recover for any injury or loss or misdelivery thereof. The Terminal Company would have had a cause of action on its contract of purchase against the Standard Oil Company for failure to deliver the oil at the oil spur but not against the S. P. & S. for the Terminal Company had no title to the oil. In the event the Terminal Company had sued the Standard Oil Company for its failure to so deliver, the Standard Oil Company would have had a cause of action against the S. P. & S. Had the Standard Oil Company sued the S. P. & S. therefor the S. P. & S. could not have counterclaimed or defended on the ground that it had delivered the same at the interchange track because under its tariffs it had undertaken to deliver, for the freight rate which it had already received, at any place within Guilds Lake and the Standard Oil Company could have compelled delivery at the oil spur by the S. P. & S. without additional payment of freight.

This court has held that the bill of lading made out

simply to "Guilds Lake" showed an intention to deliver at the interchange track. Whose intention? It certainly was not the intention of the Standard Oil Company that it should be delivered at the interchange track because it had contracted with the Terminal Company to deliver it at the oil spur and it had paid the freight charges which would insure its delivery there and it could compel the S. P. & S. to deliver it there for the freight charges which had been paid. Of course, to make the delivery there the S. P. & S. would have to use the facilities and the services of the Terminal Company as a common carrier, but the Terminal Company could not have stopped the transportation short of the oil spur because it had no right to take delivery of the property as its own, short of that destination. The S. P. & S. was compelled and could be compelled by the Standard Oil Company, on account of the joint tariff, to transport the oil as a common carrier to the oil spur. Furthermore, the Standard Oil Company as owner of the oil and as consignor had the right to divert the shipment at any time up to the time it reached the oil spur, and the title to the oil was transferred to the Terminal Company. It likewise had the right of stoppage in transit in the event of the insolvency of the Terminal Company up to the time it reached the oil spur and neither the S. P. & S. nor the Terminal Company, as a carrier, could have denied this right if it had been exercised by the Standard Oil Company without being liable in damages as carriers to the Standard Oil Company.

But this court has taken into account only one ele-

ment, upon which it has determined the intention of the parties, to wit: the designation of the destination as "Guilds Lake." The S. P. & S. knew that Guilds Lake covered not only the interchange track but numerous tracks including the oil spur to which under the joint tariff it had undertaken to make delivery for the rate paid it. We submit that it was its duty and not the duty of the Terminal Company, if there was any doubt in its mind, to ascertain the exact track to which the oil was destined. The law, both statutory and as interpreted, cast upon it as the issuer of the bill of lading this duty.

The Court, however, we submit has overlooked a very material part of the evidence in this case, in determining the intention of the parties to the bills of lading, to wit: the routing designated in the bills of lading which read as follows:

> "Consigned to Northern Pacific Terminal Company, Guilds Lake, Portland, State of Oregon, Route SP&S-N. P. T."

The General Freight Agent of the S. P. & S. testified:

> "Normally such a designation as N. P. T. would indicate that the Terminal Company was to participate in the transportation. (Tr. 48.)

The witness, however, goes on to state that in this case it meant nothing to him. Why, with a tariff requiring delivery at any place in Guilds, for the money which was paid to the S. P & S. and to some of which points it required the service of the "N. P. T. Co." to make delivery, and having those initials designated in

the route of shipment, should this not show the intention that the Terminal Company was to participate as a carrier in the transportation, when ordinarily such initials in the routing would indicate that fact to the railroad. Does it not show in the bill of lading itself the intent that the Terminal Company was to be a carrier on the route of shipment, especially when it was the duty of the issuer of the bill of lading to issue a bill free of ambiguity, especially when the record showed at all times the plaintiff in fact knew where the shipments were destined and were in fact being moved, and the Terminal Company was claiming that it was performing a common carrier service and that it was not accepting delivery at the interchange track. Did the duty cast upon the S. P. & S. not require it either to make the bill of lading, which it issued, read to the oil spur or with knowledge of where the shipment was intended to go, report and pay to the Terminal Company its proportion of the freight charges?

The Standard Oil Company, being the owner of the oil until it reached the oil spur, it would be interesting to know whether or not the S. P. & S. would have claimed the entire revenue had the Standard Oil Company shipped the same on a shipper's order bill of lading consigned to "Standard Oil Company, Guilds Lake, Notify Northern Pacific Terminal Company" and whether or not it would under those circumstances have claimed a delivery to the Standard Oil Company at the interchange track. We think under these circumstances the S. P. & S. would readily concede that such delivery was not at the interchange track and would have paid

the Terminal Company its division and permitted the same to be delivered at any track in Guilds Lake.

In this connection this Court says, at page 5 of its printed opinion:

> "Applying the rule quoted, supra, that defendant is entitled to the same consideration as any commercial shipper, we hold that the designation shown as 'Guilds Lake' in the billing meant the interchange track at Guilds Lake."

We submit that in a commercial shipment this would not be the rule for there were no delivering facilities at the interchange track. It was simply a make-up and break-up yard where cars are classified and made up into trains but no shipments are delivered to consignees at that point. Furthermore, it is conceded that with reference to commercial shipments the shipper could even after the movement designate for delivery any point covered by the tariff as was conceded in shipments of oil to the Northern Pacific Railway Company consigned simply to the Northern Pacific Railway Company, Portland, Oregon, without any track being designated. (Tr. 81. Mr. Hart's concession, Tr. 82). Furthermore, the S. P. & S. had no right to make a delivery of a commercial shipment at Guilds Lake interchange track. It could only go upon that track for the purpose of an interchange for further shipment. We therefore submit that the court was in error in stating that such billing, with reference to a commercial shipment, would be interpreted as intended to be delivered on the interchange track.

On page 3 of the opinion the Court suggests that

perhaps the agreement for division, if in writing, might shed some light upon the intentions of the parties. The agreement was in writing, a very short simple statement, signed by all parties to the tariff to the effect that where two or more carriers participate in any shipment under the zone switching tariff the revenue would be divided equally between the number of carriers participating in the movement so that it contains no evidence in regard to the point here in dispute.

With reference to the Richfield Oil Company shipments the oil was purchased f. o. b. Richfield Oil plant at Linnton. The Terminal Company owned the oil during the transportation. The Richfield Oil Company however entered into the contract of shipment with the S. P. & S. and the Terminal Company never saw the bills of lading. The Terminal Company did, however, indicate that it did not accept the shipments for delivery at the interchange track and this was constantly called to the plaintiff's attention, because in this case the Terminal Company paid the freight and refused to pay anything but the S. P. & S. proportion of the freight for the through transportation from Linnton to the oil spur. These shipments were being transported almost daily. The Terminal Company as collector of the freight was making remittances monthly to the S. P. & S. on the basis that the transportation did not cease at the interchange track and it was not taking delivery at the interchange track, but at the oil spur track. The testimony of J. A. Johnsrud, Chief Clerk of Traffic Accounts of the plaintiff (Tr. 84) is significant:

"On the shipments from the Standard Oil Com-

> pany, which were prepaid, the S. P. & S. agent collected the money, the S. P. & S. had the money and refused to give any of it to the Terminal Company.
>
> "On shipments from the Richfield Oil Company the shipments were not prepaid, the Terminal Company paid the freight and retained one-half the charge."

If the letters which were exchanged between the parties, and which this court says do not comply with the duty of the Terminal Company to notify the S. P. & S. of its intention not to take delivery at the interchange track, what could be more expressive of the intention of the Terminal Company as to the destination of the shipments than its refusal every month during a period of over two years to pay the S. P. &. S. more than its division of the freight?

On page 5 of the court's opinion it is stated:

> "The requests for a division of the charges in these letters would be some evidence as to defendant's intention with respect to termination of the common carrier movement, but that alone would be insufficient to clearly show its intention as might have been done in the billing."

We submit that this intention partly expressed in these letters taken in connection with the designation of the "N. P. T." in the routing, the refusal of the Terminal Company to pay to S. P. & S. more than its division on the Richfield shipments, besides the continued knowledge, shown by the evidence throughout the record, that the actual destination was in fact the oil spur, and the fact that it was the duty of the carrier

issuing the bills of lading to issue one free of ambiguity when it had the knowledge requisite to make the billing free of ambiguity should be sufficiently clear and this evidence certainly overcomes any doubt of intention by the simple use of the words "Guilds Lake" in the bills of lading, and certainly should not warrant this court in finding as it has from these words alone that it was the intention that the shipments stopped at the interchange track, when the words "Guilds Lake" includes both the interchange track and the oil spur.

The plaintiff, as we have gathered its contention throughout the trial, in its brief, and in the argument, contends, that even if the Terminal Company had written a letter to the plaintiff, before any of the shipments moved, to the effect that the Terminal Company elected not to take delivery at the interchange track but elected to take delivery at the oil spur, that this would not be sufficient, although as we read this court's opinion it would have complied with what the court has said was our duty and that in such event the Terminal Company could have participated irrespective of the language of the bill of lading. We understand plaintiff's position is, that irrespective of any knowledge it may have of where the shipments were destined and irrespective of any notice by the Terminal Company to the S. P. & S., it was entitled to the entire revenue, unless the bill of lading itself designated "oil spur" rather than simply "Guilds Lake" as the destination and this notwithstanding the fact that it was its duty to issue a bill of lading free from ambiguity. In other words, had its own agent issuing the bill of lading been thoroughly

directed by the Terminal Company to bill it to "oil spur," that if such agent had neglected, refused or forgotten to include the words "oil spur" in the bill of lading the S. P. & S. by virture of the failure of its own agent to follow directions could and would refuse to pay the Terminal Company its division of the through rate. Plaintiff's attorneys maintain that in some way it was the obligation of the Terminal Company, although not a party to the bill of lading, and although the S. P. & S. had full knowledge of the intended destination to see that the words "oil spur" were inserted in the bills, and if the Terminal Company did not see that the S. P & S. did insert the words, then irrespective of any knowledge on its part the Terminal Company could not participate in the revenue.

This uncertainty arises only by reason of the fact that the Terminal Company had designated a track at Guilds Lake as the track on which it would receive interchange shipments. The Terminal Company could have changed this interchange track at will. It could have designated as the interchange track where it would receive shipments from the S. P. & S. at the Union Station, in which event the S. P. & S. would have been compelled to bring these cars approximately two miles further south and in which event the plaintiff concedes the designation in the bill of lading as simply "Guilds Lake" would have been sufficient to not only enable but to require the S. P. & S. to account to the Terminal Company for half the switching charges. In fact, at an earlier date the Terminal Company had designated the interchange track at the Union Station yard. It

was more convenient for all concerned to receive all shipments from the S. P. & S. at the Guilds Lake Yard, for there it made up and broke up its trains and if the interchange had been at the Union Station yard the Terminal Company would have had to take the interchanged cars back to Guilds Lake for the purpose of classifying the cars. The consignors, parties to the bills of lading, did not know where the interchange between the two carriers was effected. The S. P. & S. did know and with this knowledge it should be required to sufficiently specify, if it considered it of primary importance, that its agent in issuing the bills of lading make it specific, for it knew where the cars were actually going and it also knew that under its tariff it was required to deliver the shipments at any point within what was designated as "Guilds Lake" and it could not make delivery at any destination within Guilds Lake except by the carrier services of the Terminal Company. It could only go upon a specific track for the purpose of interchanging cars for further transportation. It knew that the Terminal Company could not unload the cars at the interchange track because it had no unloading facilities there and it had been definitely advised of the Terminal Company's refusal to accept that as the destination of the shipments, both by letter and by the refusal to pay on the Richfield Oil shipments, except on the basis of delivery at the oil spur.

The plaintiff, however, was not so squeamish in regard to shipments for other carriers, for it was accepting shipments from the Sunset Oil Company at Linnton, Oregon, consigned to "Northern Pacific Railway

Co., Portland, Oregon", and "they are billed directly to the Northern Pacific Railway Co. at Portland, Oregon, no particular track being designated." (Tr. 81.) Yet these shipments were taken to the oil spur at Guilds Lake and put into the same oil tank as the Terminal Company oil and the Northern Pacific Railway Company paid to the S. P & S. only fifty per cent of the switching charge and made its independent settlement with the Terminal Company for the Terminal Company's part of the shipment. (Tr. 82.) All the S. P. & S. required, as to showing of the destination, was the Terminal Company's statement that this shipment was unloaded at Guilds Lake Yard after the movement occurred. If the S. P. & S. could divide the revenue with the Terminal Company on the shipments to the Northern Pacific Railway Company, and not require a specific track to be designated in the bill of lading, and would accept evidence as to the movement and intention after the movement, then why was it so necessary that as far as the Terminal Company itself was concerned that the particular track be designated in the bill of lading? Why was it not the duty of the S. P. & S. to properly designate, if it deemed the same necessary, the track in the bill of lading when it issued the bills?

Pursuing the foregoing thought as to destination of the interchange track, had the Terminal Company during the course of the years of this traffic changed the designation of the interchange track on which it would receive shipments from the S. P. & S., from the Guilds Lake Yard to the Union Station Yard, or any track outside of Guilds Lake, and the bills of lading remained

as they were, would not then the Terminal Company be entitled to its division of the revenue. Or to reverse the position, if the interchange track at the inception of these shipments had been at the Union Station Yards or some track outside of the Guilds Lake Yard, and later during the course of the shipments, the Terminal Company had changed the designation of the interchange track to the Guilds Lake Yard, would that fact, coincident with the change of the interchange track give the entire revenue to the S. P. & S. or with the change of this interchange track, whose duty would it have been to change the bills of lading? Could the court have concluded, that simply by the change of the location of the interchange track to Guilds Lake, it showed an intention to accept delivery at the interchange track, instead of the oil spur where the shipments had theretofore been moving.

The record is silent as to when the Guilds Lake Yard was designated as the point of interchange. The point of interchange was simply a matter of convenience for the carriers and could be changed by the receiving carrier at any time it saw fit, and we submit that the matter of coincidence that the interchange track happened to be within Guilds Lake, did not in any way effect the intention of the ultimate destination of the shipments but was simply a matter of carrier's convenience in expediting the business between the two lines.

In this connection this court has stated in its opinion in describing the method in which the business was transacted:

"Plaintiff delivered the cars to defendant on

> the interchange track at Guilds Lake, from which track the defendant then transported the cars on the fuel oil spur to its unloading tank, the final destination, there unloaded the cars and returned them to plaintiff at the interchange track."

This would seem to indicate that the cars were taken back to the Terminal Company's interchange track at Guilds Lake whereas, after unloading, they were taken not to the Guilds Lake interchange but to the interchange of the S. P. & S. at the Admiral Dock, some one and one-half miles south of Guilds Lake, for the S. P. & S. had designated the Admiral Dock track as the track on which it would receive interchanges from the Terminal Company. (Tr. 84-85, 88.) The Admiral Dock track was designated by the S. P. & S. for its convenience. In other words, the receiving carrier designated for its convenience the track on which it would receive transfers from the other and the Terminal Company had to turn over the cars when empty at the S. P. & S. transfer track and not at the Terminal Company transfer track.

We submit, therefore, that while this court has adopted the correct principle of law it has erred in the application thereof and in determining that it was the intention of the shipper that the carrier transportation should cease at the interchange track at Guilds Lake.

Respectfully submitted,

JOHN F. REILLY,
JAMES G. WILSON,
Attorneys for Appellant.

NO. 7772

United States
Circuit Court of Appeals
For the Ninth Circuit

GEORGE D. HUBBARD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

FILED
APR 2 [illegible]
PAUL P. O'BRIEN,
Clerk

NO. 7772

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THE RECORDER PTG. & PUB. CO., 99 VAN NESS AVE. SOUTH, S. F.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

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Seattle, Washington

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955 Dexter Horton Bldg.,
Seattle, Washington

MR. J. CHARLES DENNIS
Attorney for Appellee,
222 Post Office Building
Seattle, Washington [1*]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

United States District Court, Western District of Washington, Northern Division.

May Term, 1934.

No. 43406

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE D. HUBBARD,

Defendant.

INDICTMENT.

United States of America,
Western District of Washington,
Northern Division.—ss:

Violation Section 183,
Title 18, U. S. C. A.

The grand jurors of the United States of America being duly selected, impaneled, sworn, and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present:

COUNT I.

THAT GEORGE D. HUBBARD, whose true and full name is to the Grand jurors unknown, on or about the tenth day of November, in the year of our Lord one thousand nine hundred thirty-two, the exact date being to the grand jurors unknown, at the city of Seattle, in the Northern Division of the Western District of Washington,

and within the jurisdiction of this Court then and there being, and being then and there the duly appointed, sworn, qualified and acting Collector of Customs for the United States of America for Customs Collection District Number Thirty (30), did then and there knowingly, wilfully, unlawfully and feloniously convert to his own use and thereby embezzle certain property, to-wit: approximately eighty-four (84) quarts of intoxicating liquor, the exact amount and kinds thereof being to the grand jurors unknown, which had theretofore come into his possession and under his control [2] in the execution of his office and employment as such Collector of Customs, as aforesaid, and under color and claim of authority as such Collector of Customs, all in violation of Section 97 of the Penal Code, the same being Section 183 of Title 18, of the United States Code, as he, the said GEORGE D. HUBBARD, then and there well knew; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

SAM E. WHITAKER
Special Assistant to the Attorney General.

J. CHARLES DENNIS
United States Attorney.

[Endorsed]: A True bill,

John Young
Foreman.

J. Charles Dennis.

[Endorsed]: Presented to the Court by the Foreman of the Grand Jury in open Court, in the presence of the Grand Jury, and Filed in the U. S. District Court July 26, 1934. EDGAR M. LAKIN, Clerk, By F. W. Moses, Deputy. [3]

[Title of Court and Cause.]

DEMURRER.

Comes now the defendant George D. Hubbard and demurs to the indictment herein and each and every count thereof upon the following grounds:

I.

Neither the indictment as a whole, nor any count in said indictment, states or alleges facts which constitute a violation of the laws of the United States.

II.

Neither the indictment as a whole, nor any count in said indictment, states or alleges sufficient facts to constitute against the defendant George D. Hubbard an offense against the laws of the United States.

III.

The indictment as a whole and each and every count in said indictment is so vague, indefinite and ambiguous that the defendant George D. Hubbard is not sufficiently advised as to the nature and cause of the charges against him so that he can properly prepare and submit his defenses thereto.

IV

The indictment, and each and every count in said indictment, is too vague, indefinite and uncertain to charge any facts sufficient in law to constitute any crime or offense or to fully inform the defendant George D. Hubbard of the charge against him or to make the same clear to a common understanding.

V.

The indictment, and each and every count in said indictment, fails to state or allege facts sufficient to charge the defendant with any crime or offense against the United States or any law thereof and does not describe any crime or offense in violation of or punishable under the laws thereof. [4]

WHEREFORE the defendant George D. Hubbard prays that the indictment, and each and every count thereof, be quashed and that he go hence without day.

ANTHONY SAVAGE

Attorney for defendant George D. Hubbard.

Received a copy of the within Demurrer this 10th day of Sept. 1934.

SAM E. WHITAKER
Attorney for Ptf.

[Endorsed]: Filed Sep 10 1934 [5]

[Title of Court and Cause.]

HEARING ON DEMURRER TO INDICTMENT.
(Overruled)

Now on this 28th day of September, 1934, this cause comes on for further hearing on demurrer to the indictment, and motion for bill of particulars. The Court having heard heretofore the arguments of counsel herein and taken the matters under advisement, and having thereafter received and considered the briefs of counsel, now announces ruling from the bench overruling the demurrer and denying the motion for a bill of particulars. The Clerk is to notify counsel. Exception is noted to said defendant as to each of said rulings of the Court.

Journal No. 22 Page 417. [6]

District Court of the United States
Western District of Washington
Northern Division

No. 43406

UNITED STATES OF AMERICA

Plaintiff

vs.

GEORGE D. HUBBARD,

Defendant.

VERDICT

WE, THE JURY IN THE ABOVE-ENTITLED CAUSE, FIND the defendant GEORGE D. HUBBARD is guilty as charged in the Indictment herein.

A. J. ALLEN
Foreman.

[Endorsed]: Filed Dec. 8, 1934 [7]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL.

Comes now the defendant, George D. Hubbard, and moves the court for an order granting a new trial upon the following grounds:

1. The verdict of the jury is contrary to the evidence;

2. The verdict of the jury is contrary to law;

3. There was irregularity in the conduct of counsel for the government which prevented the defendant from having a fair trial;

4. Error in law occurred during the trial, to which error the defendant took an exception;

5. There was irregularity in the proceedings of the Court and jury which prevented the defendant from having a fair trial;

6. The Court erroneously instucted the jury on the definition of the crime of embezzlement to which instruction the defendant took an exception.

ANTHONY SAVAGE
JOHN J. SULLIVAN
Attorneys for Defendant Hubbard.

Service acknowledged. Dec. 10, 1934.

SAM E. WHITAKER
Sp. Asst. to Atty Gen.

[Endorsed]: Filed Dec. 10 1934 [8]

[Title of Court and Cause.]

HEARING ON MOTION FOR NEW TRIAL
(Denied)

Now on this 4th day of February, 1935, J. Charles Dennis, United States District Attorney, appearing for the plaintiff and Anthony Savage, Esq., and John J. Sullivan, Esq., appearing for the defendant, this cause comes on for hearing on motion for new trial. The motion is argued by counsel and is denied. Exceptions is allowed.

Motion in arrest of judgment is argued and denied. Exception is allowed.

Journal No. 22 Page 719. [9]

In the United States District Court for the Western District of Washington Northern Division.

Judge Bowen presiding:

No. 43406

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE D. HUBBARD,

Defendant.

SENTENCE.

Comes now on this 4th day of February, 1935, the said defendant, George D. Hubbard, into open court for sentence, and being informed by the court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says save as he before hath said. Wherefore by reason of the law and the premises, it is considered, ordered, and adjudged by the court that the defendant is guilty of embezzling certain intoxicating liquor and converting to his own use as charged in the indictment in violation of Section 183, Title 18, U. S. C. A., and that he be punished by being committed to the custody of the Attorney General of the United States, or his authorized representative, for imprisonment in the Federal Prison Camp at Fort Lewis, Washington, or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of

the United States, for the period of eleven (11) months, and to pay a fine of $1000.00, with civil execution only as to said fine. And the defendant is hereby remanded into the custody of the United States Marshal to carry this sentence into execution.

The defendant's counsel advise the court that an appeal will be taken and asks that the amount of the appeal bond be fixed. The United States District Attorney consenting appeal bond is fixed in the sum of $2500.00 and the defendant permitted to go on his present bond until appeal bond is furnished, provided it is filed today, otherwise written consent of sureties on present bond must be filed that it may stand until a new bond is filed.

Judgment & Decree #9 Page 118. [10]

[Title of Court and Cause.]

NOTICE OF APPEAL.

Name and address of appellant: George D. Hubbard, 4622 East 40th Avenue, Seattle, Washington

Name and address of appellant's attorney: Anthony Savage, 955 Dexter Horton Building, Seattle, Washington

Offense: Violation of Section 183, Title 18, U. S. C. A.—felonious conversion and embezzlement of eighty-four (84) quarts of intoxicating liquor which had theretofore come into the possession and control of the defendant in the execution of his office and employment as Collector of Customs for the United States Collection District No. 30.

Date of Judgment: February 4, 1935.

Description of Judgment or Sentence: Eleven (11) months at Federal Road Camp located at Fort Lewis, Washington, and a fine of One Thousand Dollars ($1,000.00) to be collected by civil execution only.

Name of prison where now confined, if not on bail: At liberty on bail.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

GEORGE D. HUBBARD
Appellant

Dated: February 6 1935. [11]

Grounds of Appeal:

The trial court erred in giving the following instructions:

1. "The Collector of Customs, during all of the times mentioned in the indictments, was an officer of the United States Government. As a part of his duties there came into his possession and control alcohol and intoxicating liquors. It was his duty, as Collector of Customs, upon receipt of alcohol and intoxicating liquors that came into his possession and control, to cause the same to be destroyed unless said alcohol and intoxicating liquors could be used for official government purposes after authority for such use had been duly and regularly obtained

from the Commissioner of Customs. Under the law he had *not* right to convert the alcohol or intoxicating liquors to his own use or to give it to any other person, or to exchange it for other alcohol without such authority. Therefore, if you find from the evidence that the defendant, George D. Hubbard, made any disposition of alcohol or intoxicating liquors other than the destruction of the same in accordance with the law, or the use of the same for governmental purposes after authority had been duly and regularly obtained, then the said defendant is guilty of the crime of embezzlement, as charged."

2. "Intent to defraud is presumed when the unlawful act is proved to have been knowingly committed."

3. "If he gave it to one who was not entitled to its use and enjoyment, with the intent to deprive the true owner thereof, or permitted such person to take it and use it and enjoy it with the intent to deprive the true owner thereof, he is likewise guilty of the crime of embezzlement."

4. "I have heretofore defined embezzlement. In the second case, the defendant, George D. Hubbard alone is charged with embezzling eighty-four (84) quarts of intoxicating liquor which had been seized on board the motorship Heranger, and which came into his possession as Collector of Customs. If you find this liquor had been seized under the customs laws and did

come into his possession as Collector of Customs, and he appropriated it, or any of it, to his own use, or permitted others to do so, with intent to deprive the true owners thereof, he would be guilty as charged."

5. The trial court further erred in failing to instruct the jury as to the meaning of the words "wrongful conversion".

6. The trial court further erred in failing to instruct the jury that intent to defraud is an essential element of the claim of embezzlement and that such intent to defraud had to be proven beyond a reasonable doubt before the defendant could be found guilty.

Received a copy of the within Notice this 6 day of Feb. 1935.

J. CHARLES DENNIS, Atty for Pltff.

[Endorsed]: Filed Feb. 6, 1935 [12]

[Endorsed]: Filed Mar 1-1935

Lodged in the United States District Court, Western District of Washington, Northern Division, Feb. 26, 1935. Edgar M. Lakin, Clerk. By S. Cook, Deputy.

[Title of Court and Cause.]

BILL OF EXCEPTIONS

Be it remembered that on the 27th day of November, 1934, at 10 o'clock in the forenoon, the above entitled cause was duly called for trial before the Honorable John C. Bowen, one of the judges of

the above entitled court. The plaintiff was represented by Mr. Sam A. Whittaker, special assistant to the Attorney General of the United States, Mr. C. Charles Dennis, United States District Attorney, and Mr. Frank Pellegrini, Assistant United States District Attorney; the defendant, George D. Hubbard was present in person and represented by his attorneys, John J. Sullivan and Anthony Savage.

Thereupon the Court proceeded to empanel a jury to try the cause, and the jurors being called, came, and were then and there chosen and sworn to try the issue.

Thereupon the defendant renewed his demurrer to the indictment upon the same grounds as set forth in the demurrer made and filed prior to the trial and objected to the introduction of any evidence in support of said indictment; which demurrer was overruled and motion denied, to each of which rulings by the Court the defendant took his exception.

Thereupon the plaintiff to sustain the issue upon its part called several witnesses whose testimony tended to show that the [13] defendant had unlawfully converted intoxicating liquor and alcohol to his own use, and that he had delivered whiskey and alcohol to the United States Coast Guard Service and to the United States Coast and Geodedic Survey without first obtaining authority so to do from the Commissioner of Customs as prescribed by the Regulation of the Secretary of the Treasury promulgated under the Tariff Act of 1930, and that he

authorized, and certified to the destruction of intoxicating liquors and alcohol, which destructions had not been carried out in the manner prescribed by the Regulations of the Secretary of the Treasury promulgated under the Tariff Act of 1930.

Thereupon at the close of the plaintiff's case, the defendant introduced testimony in his own behalf, tending to rebut the evidence presented by the plaintiff.

Thereafter the plaintiff called upon several witnesses whose testimony tended to rebut some of the evidence produced by the defendant in his own behalf.

Defendant's requested instructions:

By certain counts of the indictments herein, the Defendant Hubbard is charged with a substantive offense. In other counts he is charged with conspiring with others to commit a substantive offense. In this connection I instruct you as a matter of law that it is your duty to consider the evidence with reference to these charges separately. It is your duty to return a verdict of not guilty on the counts charging the substantive offenses, unless you are convinced beyond all reasonable doubt that the Defendant Hubbard committed the substantive offenses charged therein. With reference to the conspiracy count, I instruct you as a matter of law that a man cannot conspire with himself and unless you find that the Defendant Hubbard did agree, expressly or impliedly, with some other person or persons, to do the acts which [14] are charged that he con-

nected with it in the conspiracy count, and unless you are convinced of this beyond all reasonable doubt, it is your duty to return a verdict of not guilty on such count.

A conspiracy is not an omnibus charge under which the prosecution can prove anything and everything. The charge of conspiracy is limited by the terms of the indictment. The indictment here charges but one plan, one scheme, one conspiracy— and no defendant can be convicted thereunder unless it is shown beyond a reasonable doubt that he was a member of that conspiracy or a party to that scheme. Furthermore the scope of the conspiracy must be gathered from the testimony and not from the averments of the indictment. The latter may limit the scope but cannot extend it. Proof of another conspiracy than the one alleged can not support a conviction in this case.

You are further instructed that each of these defendants has entered a plea of not guilty to this indictment, and the effect of those pleas is to place upon the government the burden of establishing each and every of the essential elements of the charges as set forth in the indictment by credible evidence to your satisfaction beyond all reasonable doubt, and each of the defendants is presumed innocent of the charges contained in the indictment, and this presumption is one of their important rights, not to be ignored or lightly considered either by the court or by the jury. It is one of the several rights which the law accords all persons accused.

It attaches to them and continues with them throughout all stages of the trial and throughout all stages of your deliberations until it has been overcome by the evidence in the case, and the guilt of a particular defendant has been established beyond all reasonable doubt, notwithstanding the presumption of innocence with which the law clothes all accused persons: and by [15] the expression "reasonable doubt" is meant in law, just what those words in their ordinary and every-day use imply; they have no technical or legal meaning different from their ordinary meaning. A reasonable doubt is a doubt which is based upon reason or is a doubt that is not unreasonable. It is such a doubt, as, if entertained by a person of ordinary prudence, sensibility and decision, would allow to have influence him in transacting the graver or more important affairs of life, causing him to pause and hesitate before acting thereon. It must be a real and substantial doubt and it must rise out of the honest minded, common-sense consideration and application of the evidence in the case or from lack of evidence in the case.

An offense may be established by circumstantial evidence; but circumstantial evidence, to warrant a conviction in a criminal case, must be of such a character as to exclude every reasonable hypothesis, but that of guilt of the offense imputed to the defendant. Each circumstance must be proved beyond a reasonable doubt; the circumstances must all be consistent with one another; they must all be con-

sistent with guilt and inconsistent with innocence. The hypothesis of guilt should flow naturally from the facts proven and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or with guilt, the law requires the defendant be given the benefit of the doubt and the theory of innocence be adopted.

I instruct you as a matter of law that you are the sole and exclusive judges of the credibility of witnesses and of the credit to be given to the testimony of any witness who has testified in this cause. In this connection I further instruct you that while you ought to be slow to believe that any witness has wilfully testified falsely in this case, nevertheless, if you are [16] convinced that any witness has wilfully testified falsely to some material matter in the case, then you are at liberty to disregard his testimony in all other respects unless it be corroborated by other credible proof.

Some of the witnesses who have testified for the government in this case are by their own testimony participants in the unlawful acts alleged in the indictment to have been done by the defendant. I charge you as a matter of law that such witnesses are by their testimony accomplices and while in the Federal Court it is the law that a jury may convict upon the uncorroborated testimony of an accomplice, if believed, nevertheless the law recognizes that such testimony comes from a polluted source and is to be received with caution by the jury and weighed and scrutinized with great care.

You are instructed that the purpose and function of evidence of good character is to raise a reasonable doubt and that such evidence is entitled to be considered whether the effect of the other evidence in the case is clear or doubtful; evidence has been introduced upon the trial of this case tending to show and establish that the defendant Hubbard is a man whose reputation for truth and veracity and as a law-abiding citizen has been good; when this evidence is considered by you along with the other evidence introduced at the trial, if a reasonable doubt is created as to said defendant's guilt by the fact of his good character, he is entitled to be acquitted.

The court instructs you that if you believe the general reputation of any witness in this case has been impeached for truth, you are at liberty to reject his testimony entirely.

You are further instructed that if you find a witness to have been successfully impeached, you may entirely disregard his [17] *his* or her testimony except in so far as he or she is corroborated by other creditable testimony or by facts or circumstances satisfactorily proved on the trial.

Even though the evidence in this case should engender in your minds a strong suspicion of probability of guilt of the accused, still the defendant cannot be convicted unless you are satisfied beyond a reasonable doubt of his guilt. In considering the evidence in this case I charge you that it is not sufficient for you to find merely that the evidence adduced is consistent with the theory of the de-

fendant's guilt, but before you can find the defendant guilty you must believe beyond a reasonable doubt that it is inconsistent with his innocence and inconsistent with every other reasonable hypothesis except that of guilt.

(11) The Court instructs you that it is the function of a lawsuit to get at the truth of a case and that it is the duty of the parties to a lawsuit to exhaust reasonably within their power, as the jury reasonably sees the power is within their reach, the avenues of testimony leading to a determination of the truth, and, in determining where the facts of this case lie, it is proper for you to look to the manner in which this case is presented to you to determine whether or not the parties to this case, either or both of them, have reasonably exercised the opportunities open to them to enlighten you as to what the facts are, and if you find in the reason of things, as these circumstances illuminate your judgment, that there were reasonably at hand, within the command of either party to this case, witnesses who might give you valuable testimony upon any proposition, who were not put upon the stand, you are permitted to draw such inferences as reasonable men would draw under such circumstances [18] from the failure to employ such opportunity.

(12) If you find from a consideration of all the evidence in this case against the defendants or any of them, that the evidence so produced is as consistent with their innocence as with their guilt, then, I instruct you, as a matter of law, that you must re-

turn a verdict of not guilty against any such defendant or defendants.

After counsel for the plaintiff and for the defendant had argued the case to the jury, the court instructed the Jury as follows: [19]

COURT'S INSTRUCTIONS TO JURY

December 7, 1934

BOWEN, District Judge:

Members of the Jury: You have heard the testimony and listened to the arguments of counsel. After the court instructs you you will retire to the jury room to consider your verdict.

The case in which Howard R. Crow was named as a defendant has been dismissed as to him and in your deliberations in the jury room you will not be concerned with his guilt or innocence.

By agreement of the parties and the order of the court in the case of United States vs. George D. Hubbard, Samuel Lewis, Perry V. Wilcox and Howard R. Grow (No. 43403), and the case of United States vs. George D. Hubbard (No. 43406) are being tried together.

In the case of United States vs. George D. Hubbard, Samuel Lewis, Perry V. Wilcox and Howard R. Crow, the case as to the defendant, Howard R. Crow, as previously stated has been dismissed, and the defendants now before the Court, George D. Hubbard and Perry V. Wilcox, are charged by the grand jury in the first count of this case with having entered into a conspiracy between themselves and

with others in the city of Seattle, King County, Washington, some time in the early part of 1930, to embezzle and wrongfully convert to their own use intoxicating liquors then in the possession of George D. Hubbard by virtue of his office as Collector of Customs for this district, which conspiracy, it is alleged, continued until the first day of August, 1933; and with having committed certain overt acts as set out in the indictment in furtherance of the conspiracy.

In the second count of this indictment these defendants [20] are charged with having entered into a conspiracy between themselves and with others at the same time and place to defraud the United States by impairing, obstructing or defeating the lawful function of the Treasury Department of the United States in its administration of the Tariff Act, first, by converting to their own use, or to the use of some one or more of them, intoxicating liquors which were in the possession or might thereafter come into the possession of the defendant, George D. Hubbard, by virtue of his office as Collector of Customs; and, second, by themselves executing and causing others to execute false certificates showing the destruction of the liquor converted to their own use; and, third, by falsifying or causing the falsification of a record known as "Receipt and Delivery of Seized Goods".

In the case against George D. Hubbard alone (No. 43406), he alone is charged with having converted to his own use and having embezzled eighty-

four (84) quarts of intoxicating liquors which had come into his possession by virtue of his office as Collector of Customs. The other defendant on trial, Perry V. Wilcox, is not concerned in any way in this second case charging George D. Hubbard with embezzlement.

You are the exclusive judges of the facts. In determining what the true facts of the case are, you will weight and examine the testimony of each and every witness that has been introduced by both the government and by the defendants, giving to the testimony of each witness such weight as you in your own judgment think that testimony deserves.

You are the sole judges of the credibility of the witnesses, and in determining the weight to which you think the testimony of each witness is entitled, you will take into consideration the demeanor of the witness on the witness stand, his [21] opportunity or lack of opportunity of knowing the facts about which he testifies, his interest or lack of interest in the case, if any, the reasonableness of his story, and from all these facts and circumstances you will determine the weight to which the testimony of each of the witnesses is entitled.

When a defendant testifies on his own behalf the law is the same in respect to him as in respect to any other witness. You may consider what interest he has in the outcome of the case, and whether that interest has been sufficient to lead him to deny things that really are true, or to testify falsely in any particular. You will weigh the testimony of

each defendant in the same manner you would weigh the testimony of anyone else, considering his position.

If you find that a witness has testified falsely in any one particular, you may disregard any other testimony of that witness, unless corroborated to your satisfaction by other evidence, or by other facts and circumstances.

To the indictments and to both of the counts of the indictment charging the two defendants now on trial with conspiracy (being cause No. 43403), each and every one of them has entered a plea of "not guilty"; and George D. Hubbard has entered a plea of "not guilty" to the charge of embezzlement in the case in which he is indicted alone, being cause No. 43406.

This plea of "not guilty" puts in issue every material allegation of the indictments and each count thereof, and casts on the government the burden of proving the guilt of the defendants beond a rasonable doubt.

Each of the defendants on trial, as well as every defendant in a criminal case, is presumed innocent of the charges contained in the indictment until he is proved guilty beyond a [22] reasonable doubt, and this presumption is one of their important rights, not to be ignored or lightly considered either by the court or by the jury. It is one of the several rights which the law accords all persons accused. It attaches to them and continues with them throughout all stages of the trial and throughout all stages of your deliberations until it has been

overcome by the evidence in the case, and until the guilt of a particular defendant has been established beyond all reasonable doubt, notwithstanding the presumption of innocence with which the law clothes all accused persons; and by the expression "reasonable doubt" is meant in law, just what those words in their ordinary and every day use imply; they have no technical or legal meaning different from their ordinary meaning. A reasonable doubt is a doubt which is based upon reason or is a doubt that is not unreasonable. It is such a doubt, as, if entertained by a person of ordinary prudence, sensibility and decision, he would allow to have influence him in trasacting the graver or more important affairs of life, causing him to pause and hesitate before acting thereon. It must be a real and substantial doubt and it must rise out of the honest minded, commonsense consideration and application of the evidence in the case or from lack of evidence in the case.

Even though the evidence in this case should engender in your minds a strong suspicion of probability of guilt of the accused, still the defendant cannot be convicted unless you are satisfied beyond a reasonable doubt of his guilt.

In considering the evidence in this case I charge you that it is not sufficient for you to find merely that the evidence adduced is consistent with the theory of the defendant's guilt, but before you can find the defendant guilty you must believe beyond a reasonable doubt that it is inconsistent with his

[23] innocence and inconsistent with every other reasonable hypothesis except that of guilt.

In case No. 43403, in which both of the defendants, Hubbard and Wilcox, are jointly charged, they are charged with having conspired to do the acts alleged.

A conspiracy may be defined as a combination or agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means, and the doing of some act by some one or more of them for the purpose of carrying the conspiracy into effect. It is not necessary that the act or acts done should consummate the conspiracy. It is only necessary that it be done for the purpose of carrying the conspiracy into effect, whether it was finally consummated or not.

In considering your verdict as to each of the defendants, Hubbard and Wilcox, you will first consider whether or not a combination or agreement to do an unlawful act existed, as charged, and if you find from the evidence beyond a reasonable doubt, such a combination or agreement did so exist, you will then consider which one of the defendants was a party to that agreement. It is, however, unnecessary that all the parties charged should have been party to the agreement when it was originally formed. If, after the formation of the original agreement, any other one of the alleged conspirators joined in the conspiracy, or, in other words, became a party to the agreement, he would be equally guilty with those who originally entered into the agreement. And, if you find that either or

both of those charged were not parties to the conspiracy in the beginning, but later did some act, with knowledge of the conspiracy, which in natural consequence had the effect of furthering the object of the conspiracy, or which was intended to further its objects, they would [24] be equally guilty with those originally forming the conspiracy. On the other hand, if some one or more of the defendants did an act having the effect of furthering the objects of the conspiracy, but if he did it in ignorance of the existence of the conspiracy, he would not be guilty, although some one of the conspirators procured him to do the act. But a person cannot close his eyes to that which is obvious. If any of the conspirators knew of any facts or circumstances that would lead a person of his intelligence to suspect the existence of an unlawful agreement, and that the act done by him would probably have the effect of furthering such agreement, it would be his duty to make inquiry as to whether such an agreement existed in fact before doing the act; and if he did such an act without making such inquiry, and if such act had as its natural consequence the furtherance of the objects of the conspiracy, he would be guilty.

Nor is it necessary that it be proven that the defendants conspired with each other, if it be shown that some one of the defendants conspired with some one or more of the persons with whom the indictment alleges he conspired, although such person be not named as a defendant.

Now, in the first count of the indictment for

conspiracy, the defendants are charged with a conspiracy among themselves and others named in the indictment to embezzle and to convert to their own use or to the use of some one or more of them intoxicating liquors which were then and might thereafter come into the possession of the defendant, George D. Hubbard, by virtue of his office as Collector of Customs for this district. The law makes it a crime for any officer of the United States to embezzle or wrongfully convert to his own use property which had come into his possession or under his control in the execution of his of- [25] fice or employment, whether the property shall be the property of the United States or of some other person. I charge you that under the law the Collector of Customs has the possession of, and is responsible for the custody of, and the disposition of, property seized under the customs laws, and such officer was so responsible and had such possession during the period covered by this indictment.

The Collector of Customs, during all of the times mentioned in the indictments, was an officer of the United States government. As a part of his duties there came into his possession and control alcohol and intoxicating liquors. It was his duty, as Collector of Customs, upon receipt of alcohol and intoxicating liquors that came into his possession and control, to cause the same to be destroyed unless the said alcohol and intoxicating liquors could be used for official government purposes after authority for such use had been duly and regularly obtained from the Commissioner of Customs. Under the law he

had no right to convert the alcohol or intoxicating liquors to his own use or to give it to any other person, or to exchange it for other alcohol without such authority. Therefore, if you find from the evidence that the defendant, George D. Hubbard, made any disposition of alcohol or intoxicating liquors other than the destruction of the same in accordance with the law, or the use of the same for governmental purposes after authority had been duly and regularly obtained, then the said defendant is guilty of the crime of embezzlement, as charged.

Embezzlement may be defined to be the wrongful appropriation to one's own use of the property of another which was at the time in his possession and control, with intent to deprive the true owner thereof. But it is not necessary that the person [26] charged with the custody of it should himself enjoy the property or the use of it. If he gave it to one who was not entitled to its use and enjoyment, with the intent to deprive the true owner thereof, or permitted such person to take it and use it and enjoy it with the intent to deprive the true owner thereof, he is likewise guilty of the crime of embezzlement.

It is not necessary that the true owner of the property should suffer a financial loss by its misappropriation; nor that the true owner intended to use and enjoy it. A party may be guilty of embezzlement of property although the true owner meant to destroy it. Especially is this true where the true owner intended to destroy it to prevent its use by others.

By certain counts of the indictments herein, the defendant Hubbard is charged with a substantive offense. In other counts he is charged with conspiring with others to commit a substantive offense.

In this connection I instruct you as a matter of law that it is your duty to consider the evidence with reference to these charges separately. It is your duty to return a verdict of not guilty on the counts charging the substantive offenses, unless you are convinced beyond all reasonable doubt that the defendant Hubbard committed the substantive offenses charged therein.

With reference to the conspiracy count, I instruct you as a matter of law that a man cannot conspire with himself and unless you find that the defendant Hubbard did agree, expressly or impliedly, with some other person or persons, to do the acts which are charged that he conspired to do in the conspiracy count, and unless you are convinced of this beyond all reasonable doubt, it is your duty to return a verdict of not [27] guilty as to him on such count.

A conspiracy is not an omnibus charge under which the prosecution can prove anything and everything. The charge or accusation is limited by the terms of the indictment. The indictment here charges but one plan, one scheme, one conspiracy, and no defendant can be convicted thereunder unless it is shown beyond a reasonable doubt that he was a member of that conspiracy or a party to that scheme. Furthermore, the scope of the conspiracy must be gathered from the testimony

and not from the averments of the indictment. The latter may limit the scope but cannot extend it. Proof of another conspiracy than the one alleged can not support a conviction in this case.

An offense may be established by circumstantial evidence; but circumstantial evidence, to warrant a conviction in a criminal case, must be of such a character as to exclude every reasonable hypothesis, but that of guilt of the offense imputed to the defendant. Each circumstance must be proved beyond a reasonable doubt. The circumstances must all be consistent with one another; they must all be consistent with guilt and inconsistent with innocence. The hypothesis of guilt should flow naturally from the facts proven and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or with guilt, the law requires the defendant be given the benefit of the doubt and the theory of innocence adopted.

As elsewhere instructed in these instructions, you are the sole and exclusive judges of the credibility of witnesses and of the credit to be given to the testimony of any witness who has testified in this cause. In this connection I further instruct you that while you ought to be slow to believe that any [28] witness has wilfully *testied* falsely in this case, nevertheless, if you are convinced that any witness has wilfully testified falsely to some material fact in the case, then you are at liberty to *desregard* his testimony in all other respects unless it be corroborated by other credible proof.

Some of the witnesses who have testified for the government in this case are by their own testimony participants in the unlawful acts alleged in the indictment to have been done by the defendant. I charge you as a matter of law that such witnesses are by their testimony accomplices and while in the Federal Court it is the law that a jury may convict upon the uncorroborated testimony of an accomplice, if believed, nevertheless the law recognizes that such testimony comes from a polluted source and is to be received with caution by the jury and weighed and scrutinized with great care.

You are instructed that the purpose and function of evidence of good character is to raise a reasonable doubt, and that such evidence is entitled to be considered whether the effect of the other evidence in the case is clear or doubtful. Evidence has been introduced upon the trial of this case tending to show and establish that the defendant Hubbard is a man whose reputation for truth and veracity and as a law abiding citizen, and as an honest government official has been good; when this evidence is considered by you along with the other evidence introduced at the trial, if a reasonable doubt is created as to said defendant's guilt by the evidence of his good character, he is entitled to be acquitted.

Evidence has been offered in this case that one of the defendants, Lewis, indicted with the other defendants, has not yet been apprehended. The court instructs you with reference to [29] this evidence that no presumption or inference of any kind or character can be indulged in by the jury

with reference to the defendants now on trial in this case and in addition thereto that these defendants now on trial are in no wise responsible for any act or acts of the defendant Lewis since the return of this indictment brought by the grand jury.

You are instructed that when it is successfully proven that the general reputation of a witness for general moral character or for truth and veracity is bad, the witness is impeached and the jury will be warranted in disregarding the testimony of such witness as unworthy of belief, except in so far as the same is corroborated by other credible testimony.

You will note that the indictment purports to charge a number of so-called overt acts. You are instructed that mere proof of an overt act, or overt acts, as charged in the indictment, alone proves no conspiracy, without further proof beyond a reasonable doubt of an unlawful agreement or combination entered into by two or more persons charged in the indictment herein, to commit the unlawful acts charged in the indictment. This is true even though the evidence shows the overt act or overt acts alleged to be unlafwul in themselves.

You are further instructed that such overt act or overt acts must be found from the evidence to be clearly referable to such unlawful agreement, provided you find from the evidence that such unlawful agreement in fact did exist as alleged in the indictment. Even participation in the offense itself which is alleged to be the object of the conspiracy, does not necessarily prove the participant

guilty of such conspiracy. There must in addition thereto be proof beyond a reasonable doubt of the unlawful agreement and participation therein by the particular defendant or defendants with knowledge on his or their part of [30] the existence of the unlawful agreement charged in the indictment. These matters must be proved beyond a reasonable doubt, not by a presumption based upon another presumption, which might arise from the evidence, but only upon facts introduced in evidence by credible witnesses before you. The unlawful agreement is the gist of the offense of conspiracy and unless you find two or more of the persons named in the indictment herein so entered into the unlawful agreement specifically charged in the indictment herein, and actively participated therein, and that one or more of the defendants committed at least one of the overt acts alleged in the indictment, with knowledge of such unlawful agreement, you are not at liberty to return a verdict of guilty herein.

You are instructed that the law gives rise to a presumption that persons in the discharge of their duties are always prompted by honest motives. You will accord to the defendants herein, and each of them, the benefit of such presumption, until it is overcome by evidence convincing you beyond reasonable doubt and to a moral certainty, that a particular defendant or particular defendants, are or were not, prompted by such honest motives.

If you believe from the evidence that any defendant or defendants committed one or more of the overt acts charged in the indictment while carry-

ing out the instruction of a superior officer and while acting honestly and in good faith and without knowledge of the existence of any conspiracy or intent to further the same, such defendant or defendants cannot be found guilty on either count charged in the conspiracy indictment and you must acquit such defendant as to such indictment.

You are instructed that mere knowledge of an unlawful conspiracy on the part of an individual defendant, or mere knowledge on his part of an unlawful act in the furtherance of such [31] conspiracy, is not sufficient to make such individual defendant a member of such conspiracy or a party to same, but before he is deemed criminally liable, it must appear from the evidence beyond a reasonable doubt that he actively participated in such conspiracy and knowingly and intentionally committed some overt act in the furtherance of such conspiracy.

You are instructed that the indictment and the statements therein contained are not evidence of guilt of the defendants or any of them; but that the indictment is merely a paper charge. No inference should be drawn against the defendants or any of them, from the mere fact that the indictment has been returned against them and the guilt or innocence of the defendants and each of them must be determined by you solely from credible evidence introduced in the trial before you, and not from the statements set forth in the indictment.

You are instructed that to constitute a conspiracy, there must have been an agreement between the

of
defendants, a unity ~~and~~ design and purpose, and an overt act or acts committed by one or more of the defendants for the purpose of effecting the object of the conspiracy.

You are instructed that intent is an essential element of the crime charged and it is the duty of the government to prove guilty knowledge on the part of each defendant, and before you can find any defendant guilty of such crime, you must find that such defendant had an intention to take part in the conspiracy and had an intent to defraud the United States or to commit an offense against the United States, as charged in the indictment, and if you believe from the evidence that one or more of the defendants did not have such intent, you must acquit such defendant or defendants.

Intent is an ingredient of crime. It is psychologically [32] impossible for you to enter into the mind of the defendants and determine the intent with which they operated. You must, therefore, determine the motive, purpose and intent from the testimony which has been presented, and you will consider all the circumstances disclosed by the witnesses as testified to, bearing in mind that the law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts, knowingly or intentionally committed, cannot be justified on the ground of innocent intent. The color of the act determines the complexion of the intent. Intent to defraud is presumed when the unlawful act is proved to have been knowingly committed.

There are two kinds of evidence. Direct or positive, and circumstantial. Direct and positive testimony is that which a person observes or sees or which is susceptible of demonstration by the senses, and circumstantial evidence is proof of such facts and circumstances concerning the conduct of a party which conclude or lead to a certain inevitable conclusion. Circumstantial evidence is legal and competent as a means of proving guilt in a criminal case, but the circumstances must be consistent with each other, consistent with the guilt of the party charged; inconsistent with his innocence and inconsistent with every other reasonable hypothesis except that of guilt, and when circumstantial evidence is of that character, it is alone sufficient to convict. You will review all the cirmustances in the light of this instruction.

You are instructed that you are not to consider any statements made or acts done by any defendant or other person named in the indictment in the absence of other defendants except against the individual making the statements, unless and until you find from the evidence beyond a reasonable doubt that the conspiracy was entered into as charged and further that such [33] statements or acts were made or done in furtherance of such conspiracy and that the defendant or other person named in the indictment so making such statements was authorized by the other defendant to make the statements in question, and in such case you will consider such evidence against the defendant, if any, actually making such statements or doing such

acts and such other defendant only as you shall be convinced from the evidence beyond a reasonable doubt, if you are so convinced, authorized the making of such statements and/or the doing of such acts.

If, however, you find from the evidence beyond a reasonable doubt that the alleged conspiracy did exist as charged and that one defendant or other person named in the indictment was, by an absent defendant, authorized to and did make a statement or do some act in furtherance of such conspiracy, then you may consider such statement or act against such absent defendant so authorizing it, as under all of these circumstances each conspirator, whether or not he is named in the indictment as a defendant, would be the agent of all the other conspirators, and the statements and acts of each conspirator, if made or done under all these circumstances, would be binding on all the conspirators.

You will consider all evidence admitted by the court before you, and you will disregard all evidence offered but not admitted by the court.

In this connection you are instructed that you are not called upon to pass upon objections and exceptions taken by counsel and you should not allow the making of objections and exceptions by counsel to confuse you.

Now, it is not necessary that the unlawful agreement be evidenced by any written instrument; it may be a verbal [34] understanding or agreement. Nor is it necessary that the making of that agreement be proven by direct or positive evidence; it may be proven by circumstantial evidence, by proof

of facts and circumstances, or by the acts of the parties, by what was done; and these facts and circumstances may be considered by you with the other testimony in the case in determining whether or not the conspiracy as alleged in fact existed. But, where circumstantial evidence alone is relied upon to establish the guilt of the accused, it must not only be consistent with his guilt, but inconsistent with his innocence, and must *excluse* every reasonable hypothesis other than that of his guilt.

It is not necessary that it be proven that the conspiracy was entered into on the date alleged in the indictment; it is only necessary that it be proven that it was formed within three years prior to the finding of the indictment, or, if earlier than that, that some overt act in furtherance of it was done within three years prior to the finding of the indictment.

The fact that the defendant, Perry V. Wilcox, was an officer in the Customs Service subordinate to the defendant George D. Hubbard, and was subject, in the performance of his duties, to the control and supervision of the defendant George D. Hubbard, would not preclude him from entering into a conspiracy with the said George D. Hubbard.

In the first count of the conspiracy indictment, the defendant Hubbard and Wilcox are charged with a conspiracy to embezzle. If you find that the defendants entered into the conspiracy with one another or with any of the others named in the indictment to appropriate to their own use or to the use of some one or more of them intoxicating

liquors which had been seized under the customs laws and were in the possession of the [35] defendant, George D. Hubbard, as Collector of Customs, and to deprive the true owner thereof, and some one of the acts alleged was done to further the conspiracy by some one or more of them, then under all those circumstances such one or ones of the defendants as you find became a party to such conspiracy, if you do so find, would be guilty as charged in count one of the conspiracy indictment.

In the second count of the conspiracy indictment against the defendants Hubbard and Wilcox, they are charged with a conspiracy to defraud the United States by obstructing, impairing or defeating the performance of a lawful function of the Treasury Department of the United States. In order to defraud the United States, it is not necessary that it suffer a pecuniary loss; it has been defrauded in the sense that word is used in the law, if the lawful operation of a department of the government has been impeded or obstructed. So, if you find that the defendants, or any one of them, conspired with themselves or with others named, to impair, obstruct or defeat the performance of a lawful function of government, and one of the acts alleged was done by any one of them to carry out the conspiracy, such one of them would be guilty of a conspiracy to defraud. So that, if you find that the defendants, or any one of them, conspired with some one or more of the others named either (1) to convert to their own use, or permit others to do so, liquors in the possession of the defendant George

D. Hubbard as Collector of Customs, or (2) to execute or cause others to execute false certificates of destruction, or (3) to make false entries in the records of "Receipts and Delivery of Seized Goods", they, or such one of them, would be guilty of a conspiracy to defraud the United States.

I charge you that it was a lawful function of the Government to destroy intoxicating liquor and to require its [36] employees to execute certificates of destruction and to keep a true and accurate record of liquors received and disposed of, and that the Treasury Department of the United States had promulgated such requirements which were in force and effect throughout the period covered by the indictment.

I have heretofore defined embezzlement. In the second case, the defendant George D. Hubbard alone is charged with embezzling eighty-four (84) quarts of intoxicating liquor which had been seized on board the motorship Heranger, and which came into his possession as Collector of Customs. If you find this liquor had been seized under the customs laws and did come into his possession as Collector of Customs, and he appropriated it, or any of it, to his own use, or permitted others to do so with intent to deprive the true owners thereof, he would be guilty as charged.

You will consider each indictment separately and each count thereof and determine the guilt or innocence of each of the defendants charged therein. You will also determine the guilt or innocence of

each one of the defendants separately, and return your verdict accordingly.

You are not concerned with the punishment to be imposed, if you should find the defendants, or any one of them, guilty; that is a matter for the Court. On each indictment and on each count of the conspiracy indictment let your verdict be merely guilty or not guilty, as you may determine.

In your consideration of this case, you must not be swayed by passion or prejudice or by your sympathies. It is not for you to take into consideration the righteousness or unrighteousness of the laws with the violation of which these defendants are charged, and you are not to be concerned with whether or not others have been guilty of a like violation. You will determine from the evidence beyond a reasonable doubt solely and alone whether these defendants or any one of them are [37] guilty as charged, and you will return your verdict accordingly.

The indictments in these cases consolidated for trial will be sent to the jury room, merely to show you the paper charges against the defendants, but they are not to be considered as evidence. You will take with you to the jury room the exhibits in the case which are in evidence.

The verdicts provided for your use are in the usual form. As to each count as to each defendant in the conspiracy indictment, before the word guilty is a blank, and you will write in there the word "is" or the word "not" as you find. A simi-

lar blank is provided for recording your verdict as to defendant Hubbard alone in the embezzlement case against him.

It will require your entire number to agree upon a verdict, and when you have so agreed you will cause your verdicts to be signed by your foreman whom you will elect from among your number immediately upon retiring to the jury room, and return with your verdicts into court.

Counsel, have I overlooked anything? Are there any exceptions?

Thereupon and before the jury retired to deliberate upon its verdict, the following proceedings were had:

MR. SAVAGE: May I first express my admiration for Your Honor's fine, impartial and fair instructions.

I take exception to Your Honor's refusal to give defendants' requested instructions number 11 and 12.

THE COURT: The exception is allowed.

MR. SAVAGE: And, if Your Honor please, we except to Your Honor's instruction that a man cannot close his eyes to what is obvious, and that if one sees things done that would probably have the effect of furthering the conspiracy, there was a duty upon him to make an inquiry, as an incorrect statement of the law and,— [38]

THE COURT: The exception is allowed.

MR. SAVAGE: We except to Your Honor's instruction that the defendant had no right to give

the liquor or the alcohol, or to put it to any other use than government use, or to make any disposition of it other than for governmental purposes after having first obtained authority from the government so to do, and if he did give it to other parties or for other uses, he was guilty of embezzlement, on two grounds: In the first place, in cause No. 43403, he is not charged with embezzlement; and in the second place, there is no embezzlement unless there is a fraudulent appropriation to one's own use. The mere fact that liquor may be given for something else does not constitute embezzlement.

THE COURT: Exception allowed.

MR. SAVAGE: We except to Your Honor's instruction that the intent to defraud is presumed when the unlawful act is knowingly committed. The reason for the exception is that where intent is a specific ingredient or essential of a crime, then the specific intent to defraud must be proved, and it cannot be presumed.

THE COURT: Exception allowed.

MR. SAVAGE: We except to Your Honor's instruction with respect to indictment No. 43406, that if the defendant appropriated the liquor to his own use or permitted others to do so, he would be guilty of embezzlement, as being an incorrect definition of the crime of embezzlement.

THE COURT: The exception is allowed. And to each and every one of the requested instructions not given your objection is noted and an exception is allowed.

MR. SAVAGE: Thank you, Your Honor.

MR. ROBBINS: The defendant Wilcox desires to except to [39] the instruction with respect to the embezzlement in cause No. 43403, and also Your Honor's instruction with respect to intent, upon the same grounds advanced by Mr. Savage.

THE COURT: The exceptions requested on each and all of them are allowed.

MR. SULLIVAN: May I join in commending the court on the fine and impartial instructions which have been given.

MR. WHITAKER: I should also like to join.

THE COURT: The court is supposed to do its duty without commendation, and while he appreciates it, is is not necessary. I thank you just the same.

The jury will retire to the jury room and consider the verdict. After this, you will have to remain together and do not become separated, except under special *accomodations,*—

MR. SAVAGE: As far as the defendant Hubbard is concerned, if the jury arrives at a verdict this evening,—

THE COURT: That can be settled after the jury leaves. The Marshal will make arrangements for the housing of the jurors, under instructions which will prevent the jury from becoming separated. (to jury) You will at no time become separated until you arrive at a verdict.

I will instruct the jury this much further: That in case you arrive at your verdicts this evening at any time so that you can go to your several homes for the night, you can have the verdicts which you agree upon, signed by your foreman, put in an envelope which the bailiffs will provide, and sealed, and give them back into the possession of the foreman, and he, together with all the rest of you, may report to your homes for the rest of the night, separately, and you will return here in the morning at nine o'clock, instead of the usual time at ten. Come at nine o'clock, and your foreman will have with him the sealed verdicts. The foreman is to keep them in his possession at all [40] times after they are given to him. If you do render sealed verdicts, you will not speak to any one concerning what took place in the jury room until after the court has discharged you from further consideration of the case.

You may now retire to the jury room to consider the verdicts.

(Jury Retires)

The defendant prays that this, his Bill of Exceptions, may be allowed, settled and signed.

JOHN J. SULLIVAN
ANTHONY SAVAGE
Attorneys for Defendant

Settled and allowed on this 1st day of March, 1935.

JOHN C. BOWEN
District Judge

Received a copy of the within Bill of Exceptions this 26 day of Feb., 1935

J. CHARLES DENNIS
Atty for Pltff. [41]

[Title of Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing twenty-nine (29) pages truthfully set forth proceedings had upon the trial of the defendant George D. Hubbard, *insofar* as they are stated. In addition to the testimony set out in said pages hereinabove, other testimony relevant to and tending to prove the guilt of the defendant with respect to the material allegations contained in the indictment herein was introduced, received, and considered. In addition, the Bill contains all instructions requested by the defendant, and all of the instructions given the jury by the Court at the conclusion of the case, together with the exceptions taken to the Court's refusal to give certain of the instructions requested, and also the exceptions taken by the defendant to certain of the instructions given, and the foregoing is hereby settled, allowed, and
the
certified as ∧ Bill of Exceptions; and the Clerk of the Court is hereby ordered to file the same as a record in said cause and transmit it to the Honorable Circuit Court of Appeals for the Ninth Circuit.

DONE in open court this 1st day of March, A. D. 1935.

JOHN C. BOWEN
United States District Judge

Presented by:
ANTHONY SAVAGE
JOHN J. SULLIVAN
~~U. S. Attorney~~
Attorneys for Defendant

O. K.
J. CHARLES DENNIS
U. S. Attorney [42]

[Endorsed]: Filed Feb 26 1935

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR

Comes now the defendant, George D. Hubbard, by John J. Sullivan and Anthony Savage, his attorneys, and in connection with his appeal herein, assigns the following errors which he avers occurred in the proceedings prior to the trial and on the trial of said cause, which were duly excepted to by him, and upon which he relies to reverse the judgment entered against him.

I

The District Court erred in overruling the defendant's demurrer to the indictment.

II

The District Court erred in instructing the jury as follows:

> The Collector of Customs, during all of the times mentioned in the indictments, was an officer of the United States Government. As a part of his duties there came into his possession and control alcohol and intoxicating liquors. It was his duty, as Collector of Customs, upon receipt of alcohol and intoxicating liquors that came into his possession and control, to cause the same to be destroyed unless said alcohol and intoxi- [43] cating liquors could be used for official government purposes after authority for such use had been duly and regularly obtained from the Commissioner of Customs. Under the law he had no right to convert the alcohol or intoxicating liquors to his own use or to give it to any other person, or to exchange it for other alcohol without such authority. Therefore, if you find from the evidence that the defendant George D. Hubbard made any disposition of alcohol or intoxicating liquors other than the destruction of the same in accordance with the law, or the use of the same for governmental purposes after authority had been duly and regularly obtained, then the said defendant is guilty of the crime of embezzlement, as charged.

III

The District Court erred in instructing the jury as follows:

> Intent is an ingredient of crime. It is psychologically impossible for you to enter into the mind of the defendants and determine the intent with which they operated. You must, therefore, determine the motive, purpose and intent from the testimony which has been presented, and you will consider all the circumstances disclosed by the witnesses as testified to, bearing in mind that the law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts, knowingly or intentionally committed, cannot be justified on the ground of innocent intent. The color of the act determines the complexion of the intent. Intent to defraud is presumed when the unlawful act is proved to have been knowingly committed.

IV

The District Court erred in instructing the jury as follows:

> If he gave it to one who was not entitled to its use and enjoyment, with the intent to deprive the true owner thereof, or permitted such person to take it and use it and enjoy it with the intent to deprive the true owner thereof, he is likewise guilty of the crime of embezzlement. [44]

V

The District Court erred in instructing the jury as follows:

> I have heretofore defined embezzlement. In the second case, the defendant George D. Hubbard alone is charged with embezzling eighty-four (84) quarts of intoxicating liquor which had been seized on board the motorship Heranger, and which came into his possession as Collector of Customs. If you find this liquor had been seized under the customs laws and did come into his possession as Collector of Customs, and he appropriated it, or any of it, to his own use, or permitted others to do so, with intent to deprive the true owners thereof, he would be guilty as charged.

VI

The District Court erred in refusing to *giving* defendant's requested instruction number XI:

> The Court instructs you that it is the function of a lawsuit to get at the truth of a case and that it is the duty of the parties to a lawsuit to exhaust reasonably within their power, as the jury reasonably sees the power is within their reach, the avenues of testimony leading to a determination of the truth, and, in determining where the facts of this case lie, it is proper for you to look to the manner in which this case is presented to you to determine whether or not the parties to this case, either or both of them,

have reasonably exercised the opportunities open to them to enlighten you as to what the facts are, and if you find in the reason of things, as these circumstances illuminate your judgment, that there were reasonably at hand, within the command of either party to this case, witnesses who might give you valuable testimony upon any proposition, who were not put upon the stand, you are permitted to draw such inferences as reasonable men would draw under such circumstances from the failure to employ such opportunity. Young v. Corrigan, 208 Federal Reporter 435. [45]

VII

The District Court erred in refusing to give defendant's requested instruction number XII:

If you find from a consideration of all the evidence in this case against the defendants or any of them, that the evidence so produced is as consistent with their innocence as with their guilt, then, I instruct you, as a matter of law, that you must return a verdict of not guilty against any such defendant or defendants. Isbell v. United States, 227 Federal Reporter 788, page 792.

VIII

The District Court erred in failing and neglecting to instruct the jury as to the meaning of the phrase "wrongful conversion". (The defendant made no request for such an instruction and took no exception to the court's failure to so charge.)

IX

The District Court erred in failing and neglecting to charge that intent to defraud is an essential ingredient of the crime of embezzlement and that before they could find the defendant guilty of that crime the existence of an intent to defraud must be established to their satisfaction beyond a reasonable doubt. (The defendant made no request for such an instruction and took no exception to the Court's failure to so charge.)

X

The District Court erred because all the reasons set forth in the foregoing assignments of error in denying the defendant's motion for a new trial.

XI

The District Court erred in pronouncing judgment upon the defendant. [46]

WHEREFORE the defendant prays that the judgment of said District Court against him be reversed and the cause remanded to the District Court with instructions to dismiss the same, and for such other and further relief as to the Court may seem proper.

JOHN J. SULLIVAN
ANTHONY SAVAGE
Attorneys for defendant

Service acknowledged this 26 day of February 1935.

J. CHARLES DENNIS
Attorney for Plaintiff [47]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, GEORGE D. HUBBARD as principal, and AMERICAN BONDING COMPANY OF BALTIMORE, as Surety, jointly and severally acknowledge ourselves to be indebted to the United States of America in the sum of TWENTY FIVE HUNDRED ($2500.00) Dollars, lawful money of the United States, to be levied on our goods, and chattels, lands and tenements, upon the following conditions:

The condition of this obligation is such that whereas the above named defendant, GEO. D. HUBBARD was on the 4th day of Feb. 1935, sentenced in the above entitled Court as follows: FEDERAL ROAD CAMP for 11 months and fine of $1000.00

And whereas said defendant has sued out an appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit to review said judgment.

And whereas the above entitled Court has fixed the defendant's bond to stay execution of said judgment in the amount of Twenty five Hundred ($2500.00) Dollars,

NOW, THEREFORE, if the said defendant GEORGE D. HUBBARD shall diligently prosecute said appeal and shall render himself amenable to all orders which said Circuit Court of Appeals shall make or order to be made in the premises, and to all process issued or ordered to be by said Circuit

Court of Appeals, and shall not leave the jurisdiction of this Court without permission being first granted and shall render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, then this obligation shall be void, otherwise to remain in full force and effect.

GEORGE D. HUBBARD
AMERICAN BONDING COMPANY
OF BALTIMORE
By GUY LeROY STEVICK, JR.
Attorney in Fact (Seal) [48]

Approved this 4th day of March, 1935.

JOHN C. BOWEN
Judge.

O.K. J. CHARLES DENNIS
U. S. Atty.

[Endorsed] Filed Mar 4 1935 [49]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare and certify transcript on appeal including:

Indictment (43406)

Bill of exceptions and order settling and certifying same.

Assignments of error.
Demurrer and ruling thereon.
Motion for new trial and ruling thereon.
Notice of Appeal.
Bond on appeal.
Verdict, judgment and sentence.

JOHN J. SULLIVAN
ANTHONY SAVAGE
Attorneys for Defendant.

Received a copy of the within Praecipe this 4 day of March, 1935. J. Charles Dennis, Attorney for Pltff.

[Endorsed]: Filed Mar 4, 1935 [50]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD ON APPEAL.

United States of America,
Western District of Washington—ss:

I, EDGAR M. LAKIN, Clerk of the above entitled Court, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 15, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as the same remain of record and on file in my office, as is required by praecipe of counsel

filed and shown herein, with the exception of the Bill of Exceptions and Assignments of Error, the originals of which are transmitted with this transcript; and that the foregoing constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court, at Seattle, in said District, this 12th day of March, 1935.

(Seal) EDGAR M. LAKIN,

Clerk, United States District Court,
Western District of Washington,
By TRUMAN EGGER
Deputy. [51]

[Endorsed]: Transcript of Record. Filed March 14, 1935. Paul P. O'Brien, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7772

United States
Circuit Court of Appeals
For the Ninth Circuit

GEORGE D. HUBBARD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Brief

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

FILED

MAY 13 1935

PAUL P. O'BRIEN,
CLERK

WESTERN PRINTING COMPANY, SEATTLE, WASHINGTON

No. 7772

United States
Circuit Court of Appeals
For the Ninth Circuit

GEORGE D. HUBBARD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Brief

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

WESTERN PRINTING COMPANY, SEATTLE, WASHINGTON

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STATEMENT OF THE CASE

The Appellant, George D. Hubbard, was indicted with several others for having entered into a criminal conspiracy (1) to embezzle property which had come into his possession and under his control by virtue of his official position as Collector of Customs for the United States Customs Collection District Number Thirty (30) and (2) to defraud the government of the United States by altering and falsifying certain official customs records. In a separate indictment he was alone charged with having converted to his own use and thereby embezzled eighty-four (84) quarts of intoxicating liquors which had come into his possession and under his control as Collector of Customs for Customs Collection District Number Thirty (30).

The two causes were joined for trial, and the jury returned a verdict of not guilty as to the conspiracy indictment and a verdict of guilty on the indictment charging embezzlement. From this latter verdict and the judgment and sentence based thereon, the defendant appeals.

In view of the skeleton record, which includes a statement as to what the evidence tended to prove, all of the instructions requested by the appellant, and the whole of the charge given by the court, the

appellant purposes to raise no matters except abstract questions of law: 17 Corpus Juris 177, *Thompson vs. United States*, 202 Federal 401, 41 L. R. A. N. S. 206; *People vs. Mendenhall*, 135 Calif. 344.

ARGUMENT

Assignments of Error

I.

The trial court erred in overruling the appellant's demurrer to the indictment because it fails to set out or to describe the crime of embezzlement with the requisite legal sufficiency. It is fundamental that a man cannot steal or embezzle his own property. That would be a contradiction in terms. If the accused has any legal interest in the property, even though it be jointly with another, he cannot be convicted of embezzlement in respect to such property. In brief, he cannot steal or embezzle from himself that which is already his own. (20 Corpus Juris 416). In pleading either larceny or embezzlement, it is essential that ownership of the property, either in whole or in part, in the accused, be negatived. (Wharton Criminal Law, Vol. 2, Page 128). In the indictment under consideration, there is no allegation negativing ownership in the accused. It was legally possible for the defendant in his official capacity, as Collector of Customs, to come into possession and control of his own property. Whereas the taking of that property

might constitute a breach of duty in office, yet it could by no means constitute the crime of embezzlement because he would be taking only that which was his own.

II.

The second assignment of error is predicated upon an instruction defining the limits of the crime of embezzlement, and specifically indicating what acts on the part of the appellant would bring him criminally within those limits as defined. The jury were instructed that "it was the defendant's duty as Collector of Customs, upon receipt of alcohol and intoxicating liquors which came into his possession and control, to cause the same to be destroyed unless such alcohol and intoxicating liquors could be used for official Government purposes *after* authority had been duly and regularly obtained from the Commissioner of Customs." (Tr. 28). They were further instructed that "if they found from the evidence that the defendant made *any* disposition of alcohol or intoxicating liquors other than (1) destruction of the same in *accordance with law* or (2) use of the same for Governmental purposes *after* authority had been duly and regularly obtained, then the appellant was guilty of the crime of embezzlement *as charged.*" (Tr. 29).

It is readily apparent upon even a most casual

reading of this instruction that it contains matter which cannot be justified by reason or logic, or be supported by any of the authorities. Briefly put—any possible use or disposition of alcohol or intoxicating liquors other than the two exceptions named (1) destruction according to the formula prescribed by the government or (2) use for governmental purposes *after* first complying with a requisite routine condition precedent—made the appellant an embezzler regardless of his intent, regardless of any loss to the owner or legal custodian of the property, and regardless of any conversion or unlawful appropriation to the use of the appellant himself.

There can be no quarrel as to the meaning of the term embezzlement. It is the fraudulent appropriation of another's property by a person to whom it has been entrusted or into whose hands it has lawfully come. (20 Corpus Juris 407). Ruling Case Law (9 R. C. L. 1264) defines it as the fraudulent conversion of another's personal property by one to whom it has been entrusted, with the intention of depriving the owner thereof, the gist of the act being usually the violation of relations of fiduciary character. In the leading case of *Moore vs. United States* (160 U. S. 268) the Supreme Court of the United States has said embezzlement is the fraudulent appropriation of property by a person to whom such

property has been entrusted or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.

Analyzing the authorities, it seems clear that embezzlement is a species of larceny or stealing. There are always three elements to the offense: (1) A fraudulent appropriation or conversion by the offender. (2) A loss or deprivation to the owner or custodian, and (3) A breach of trust or fiduciary relationship. Yet the meaning of embezzlement and an understanding of its component elements was completely lost sight of or overlooked in the instruction complained of. The trial court threw down the barriers and so enlarged the field that conduct which embraced none of the elements of embezzlement, or at most but one of them, was nevertheless held to constitute that crime.

Let us assume, for example, that the defendant had taken alcohol which had been seized by the United States Customs Officers, and without first writing to the Commissioner of Customs at Washington, D. C., as he was required to do by the regulations, he had it poured into the radiators of government cars to be used for "Anti-freeze", a usual

and permissible practice. The government would have lost nothing, the defendant would have appropriated nothing to his own use, and there would have been no breach of trust, merely a breach of a regulation respecting procedure,—still, under the court's instructions, the jury would have been required to find him guilty of embezzlement.

Or suppose that he took liquor which had been seized, and *before* obtaining authority from Washington, D. C., he delivered that liquor, or a portion thereof, to the United States Coast Guard, or the United States Coast and Geodetic Survey, to be used for governmental purposes. Here again there would be no loss to the government, there would be no appropriation by the defendant, or by anyone on his behalf, and there would be no breach of his trust; and yet the jury would be compelled to find him guilty as an embezzler because he had first failed to obtain authority from a superior officer for lawful disposition of the liquor. A moment's thought will indicate to what absurd lengths this would lead us were the instruction correct. Assume that after the defendant had made such a disposition of the alcohol or intoxicating liquor, he had written to the Department and his act had been ratified by the Commissioner of Customs. Under the charge, he would be an embezzler before ratification and would be purged of his crime by such ratification, a possible

situation in view of the instruction but both a logical and legal absurdity.

The customs regulations promulgated pursuant to the passage of the Tariff Act of 1930 required that all liquor seized be destroyed in the presence of two (2) witnesses both of whom were required to sign a certificate of destruction (United States Customs Regulations 1931, Section 187, Paragraph P). The trial court told the jury that these regulations were in effect throughout the period covered by the indictment, and that they had the force and effect of law. Therefore, destruction in the presence of only one witness, or a failure to properly vouch for a destruction in a certificate, would not be a destruction *in accordance with law;* yet, although the liquor was actually destroyed by a representative of the government in the presence of one witness, and although the defendant did not appropriate to his own use or the use of anyone else a single drop of it, still the jury would be under the duty of finding him guilty of the crime of embezzlement.

In short, even though the defendant committed no act more serious than the breach of a regulation, and even though that breach did not result in any loss to the government or any gain to the defendant or in any violation of trust, yet he must be found guilty of the crime of embezzlement, *as charged.*

A mere statement of the proposition suffices to demonstrate that it is completely unsound; and the government can advance no authorities in support of the court's pronouncement. To seriously contend that there can be a theft when there is no loss by anyone, to urge that a government can be embezzled of property which never leaves its possession or control, and which it actually uses and destroys by its own officers or agents, not only does violence to reason but also renders meaningless the books and the language. A glance at the record indicating what the evidence tended to prove (Tr. 14 and 15) shows not only testimony as to conversion but also delivery to the United States Coast Guard and to the United States Coast and Geodetic Survey and in addition, destruction of alcohol and intoxicating liquors. Although the charge was undoubtedly correct in so far as it appertained to the conversion, it was just as incorrect when applied to delivery to other branches of the same governmental department or to the destruction. Since no one can say upon which act the jury relied in reaching its verdict, the instruction must be correct as an abstract proposition of law before it can stand. It is respectfully submitted that its incorrectness has been amply proven.

A brief examination of the crime, *as charged* by the indictment (Tr. 3), indicates that the defendant was accused of feloniously converting the property

to his own use and thereby embezzling it. There is nothing anywhere in the indictment, even remotely, accusing him of committing embezzlement by breaching the regulations which were to control destruction, disposal or use of government property. A reading of the particular statute involved clearly indicates that it is directed against embezzlement by wrongful conversion or fraudulent appropriation to one's own use, and makes no effort whatsoever to define as a crime or to punish a defect or an irregularity in proceeding to do that which was permissible and lawful under both the law and the regulations of the Treasury Department.

It may be argued that the trial court elsewhere in the charge correctly defined embezzlement. Even though that be true, yet that cannot cure the error committed. The court's charge must be considered as a whole. No part is inherently more important than any other, and no one is able to say to which portion a juror attached the greatest importance or what language influenced him the most in arriving at his verdict. Here the trial court, by the language complained of, fixed the limits of criminal responsibility. It descended from the general into the particular and specified what acts on the part of the defendant would bring him within the limits set and render him guilty of embezzlement. Such an error cannot be

cured by a subsequent general definition of the term embezzlement. (*State vs. Peasley*, 80 Wash. 99).

III.

The third assignment of error deals with the instruction respecting intent to defraud. It is hardly necessary to multiply authorities in support of the proposition that intent to defraud is an essential element of the crime of embezzlement or that the burden rests upon the prosecution of proving every essential ingredient of an accusation beyond a reasonable doubt. (8 Ruling Case Law 61 PP. 11). The rule is well put in 20 Corpus Juris 433—to constitute embezzlement, there must be as in larceny a fraudulent intent to deprive the owner of his property and to appropriate the same. Considerable confusion prevails in connection with the portion of the charge on intent (Tr. 36). The trial court apparently at the same time discussed intent as it pertained to both conspiracy and embezzlement; but nowhere in any of the charge does the court instruct that the government had to establish an intent to defraud beyond a reasonable doubt before it could find the appellant guilty of embezzlement, although the court in its definition of embezzlement did say that the wrongful appropriation had to be with intent to deprive the true owner thereof.

However that may be, the court declared that in-

tent to defraud *is* (not may be) presumed when the unlawful act is proved to have been knowingly committed. (Tr. 36.) In place of requiring proof of an essential element beyond a reasonable doubt, the court creates and substitutes a legal presumption therefor. The jurors are not permitted to draw their own conclusion as to the intent of the alleged wrongdoer. They are instructed that the law itself presumes an intent to defraud from an unlawful act. That, to all intents and purposes, means instead of the burden resting upon the government to prove a requisite specific intent, it was necessary only to show the commission of an unlawful act, and that thereafter it was incumbent upon a defendant to establish the absence of such an intent on his part. Such a doctrine not only overturns our whole theory of evidence but also does away with the presumption of innocence, supplanting it with a presumption of evil intent which a defendant must rebut.

Even a moment's reflection will reveal the absurdity of the instruction, "Intent to defraud is presumed when the unlawful act is knowingly committed." To what unlawful act does the court refer? What kind of an unlawful act is meant? There is a multitude of unlawful acts which can by no stretch of the imagination have any association with an intent to defraud. Yet under the language used, if the appellant

did any unlawful act, or breached some regulation of the department, the jury must under the law presume the presence of an intent to cheat or steal, even though the unlawful act resulted in no loss of or injury to the government or to anyone else. Certainly such an instruction is not only misleading and confusing, but it is also an erroneous declaration of the law.

The correct and approved rule is given in *Savitt vs. United States*, 59 Fed. (2) 541, wherein the appellate court says that intent to defraud is an element of the crime which must be proved. The trial court may not say whether there was such an intent. That is the function of the jury, to be determined by all the facts and circumstances, the only presumption being that every man intended the natural and probable consequences of his acts. But, surely, a trial judge has neither the right nor the power to relieve the prosecution of a burden which has always rested upon it, by the creation of a new legal presumption whose only merit is that of novelty and originality. He may not deprive the jury of its inherent and exclusive right to determine a question of fact which is decisive of the whole issue because an instruction which tends to exclude from the consideration of the jury a material issue is erroneous. 16 Corpus Juris 1047; *Bird vs. United States*, 180 U. S. 356.

Attention is called to the case of *McDonald vs. United States*, 9 Federal (2) 508, in which the defendant was accused of having entered into a conspiracy to injure and oppress. In the course of its opinion, the court said:

> "Intent in respect of the Federal right is an essential element of the offense charged. The legal quality and consequences of an act are not always apparent or definitely indicated. Some acts are of such an equivocal or ambiguous character that the judicial inquiry turns wholly upon the particular motive which may be disclosed by extrinsic evidence. *Buchanan vs. United States*, 233 Fed. 257."

A very instructive case on both the second and third assignments of error is *Lindgren vs. United States*, 250 Fed. 772, a decision of our own Circuit Court of Appeals. In reversing a conviction for embezzlement, the court quoted with approval the following language from a decision of the Supreme Court of Oregon.

> "Without a felonious and criminal intent on the part of the defendant, there could have been no crime although there may have been a breach of trust. This is a criminal prosecution and the conversion by the defendant must not have been only a tortious act, but it must have been with a felonious intention and this was a question of fact for the jury. If, as bailee, he refused to pay the money over but with no intention of converting it to his own uses, he cannot be convicted of the crime charged because in such a case there would be an entire absence of felonious or

> criminal intent which is an essential ingredient of the crime."

In a criminal prosecution, every intendment is in favor of the innocence of the accused. Even where certain legal presumptions have been created by Congressional act, they have been but few and due to what seemed the necessities in prosecutions of certain kinds of crime. The trial court here exceeded its powers when it removed from the deliberation of the jury a question of fact by charging them that such question of fact was legally presumed from the commission of an unlawful act.

IV.

The fourth assignment of error is predicated upon an instruction which is repeated in slightly varying language. The court first instructed that it was not necessary that the defendant should enjoy the property or the use of it himself, that if he gave it to one not entitled to its use and enjoyment with intent to deprive the true owner thereof, or *permitted* such person to take it and use it and enjoy it with intent to deprive the true owner thereof, he was guilty of embezzlement. (Tr. 39.) Later the court said that if the defendant appropriated the liquor, or any of it, to his own use, or *permitted* others to do so with intent to deprive the true owners thereof, he would be guilty of embezzlement as charged. (Tr. 41.)

We are all familiar with the fundamental principle of criminal law that unless there is an act coupled with an evil intent, there is no crime. A person may possess the worst possible intent, no matter how vile or reprehensible, if that intent is not made manifest in conduct or action, there is nothing of which the state or government can take criminal cognizance. Assuming, without admitting, that the defendant had an intent to deprive the government of alcohol or intoxicating liquors, yet if that intent did not result in an act, then there was no crime or misdemeanor. However, if the instruction laid down is the law, if the defendant had such an intent, and *permitted* someone else to take government property then he by reason of another's act became equally guilty with him. In other words, one's bare intent coupled with another's act render both criminally responsible.

The court having given no definition or explanation of the word "permit," the jury were entitled, and no doubt expected to understand it in its plain, ordinary, everyday significance. Funk and Wagnall's Dictionary defines the primary meaning of permit as follows: "To allow by tacit consent or by not hindering; to take no steps to prevent." Webster's Dictionary defines permit in the following manner: "To consent to; to allow to be done; to tolerate." In

other words, permit in its ordinary everyday significance simply portrays, not conduct, but an attitude of mind wherein no action of any kind is taken. It never has been and it is not now the law that a person is criminally responsible for a state or attitude of mind when unassociated with an act. Certainly it is a far cry to say that permitting or taking no steps to hinder another in a commission of a crime renders him equally guilty with the perpetrator thereof.

An illuminating case is *State of Washington vs. Peasley, supra,* wherein the defendant was joined with certain others in an information charging grand larceny. The court instructed that in order to convict the defendant it was not necessary that the jury find that he personally stole the money, but if it was taken by either of his codefendants with his aid or *assent*, with intent to deprive the loser thereof, then he would be just as guilty as though he himself had taken it.

In interpreting the statute respecting aiding, abetting, counselling, encouraging, commanding, or otherwise procuring another to commit a crime making such a person a principal, the Supreme Court said,

> "Each of the words used in this statute upon which a criminal charge can be predicated signifies some form of overt act; the doing or

> saying of something that either directly or indirectly contributes to the criminal act; some form of demonstration that expresses affirmative action, and not mere approval or acquiescence, which is all that is implied in assent. To assent to an act implies neither contribution nor an expressed concurrence. It is merely a mental atitude which, however culpable from a moral standpoint, does not constitute a crime, since the law cannot reach opinion or sentiment however harmonious it may be with a criminal act."

We submit that the *Peasley* case is on all fours with the instant one, and that the decision in the two must be identical.

V.

With respect to assignments VIII and IX briefly it may be said, it is fundamental that a court must, in order to accord any defendant a fair and intelligent trial, instruct on every essential question of the case so as to properly advise the jury of the issues involved. The object of the instructions is to correctly define for the jury and to direct their attention to, the legal principles which apply to and govern the facts. Hence the charge must be full (in the sense of complete), clear and explicit, giving to the jury all the law in so far as it relates to all the issues. (16 Corpus Juris 963.) Now the issues here have of necessity been framed and determined by the statute alleged to have been violated,

and the formal accusation or indictment charging the violation. The statute itself is confined and limited to the words "embezzle or wrongfully convert to his own use" and the indictment charges in the language of the statute "did unlawfully convert to his own use and thereby embezzle."

It is readily apparent that the significant language, the indispensable words are "wrongfully convert" and "embezzle." Both have a definite, well recognized, fully established legal meaning. Without a clear exposition of their legal significance, without a thorough understanding of their meaning, especially of conversion—which has both civil and criminal aspects—no jury could know how to interpret the law and apply it to the facts. Yet nowhere in the court's charge is there any definition or explanation of the meaning or import of the legal phrase "wrongful conversion." With respect to a crime which can be charged and committed in only two ways and which is pleaded in only one of those ways, unlawfully convert, the court fails wholly to instruct on that phrase, and leaves the jury in darkness as to the legally approved and accepted criminal significance of such a charge or accusation.

VI.

Because of the law and authorities above set out,

the District Court erred in denying the defendant's motion for a new trial, and in pronouncing judgment upon him.

CONCLUSION

It is respectfully submitted that the trial court erred in the particulars above stated and that the case should be reversed.

Respectfully submitted,

ANTHONY SAVAGE
JOHN J. SULLIVAN
H. SYLVESTER GARVIN.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 7772

GEORGE D. HUBBARD,

Appellant,

—vs.—

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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BRIEF PRINTING CO.

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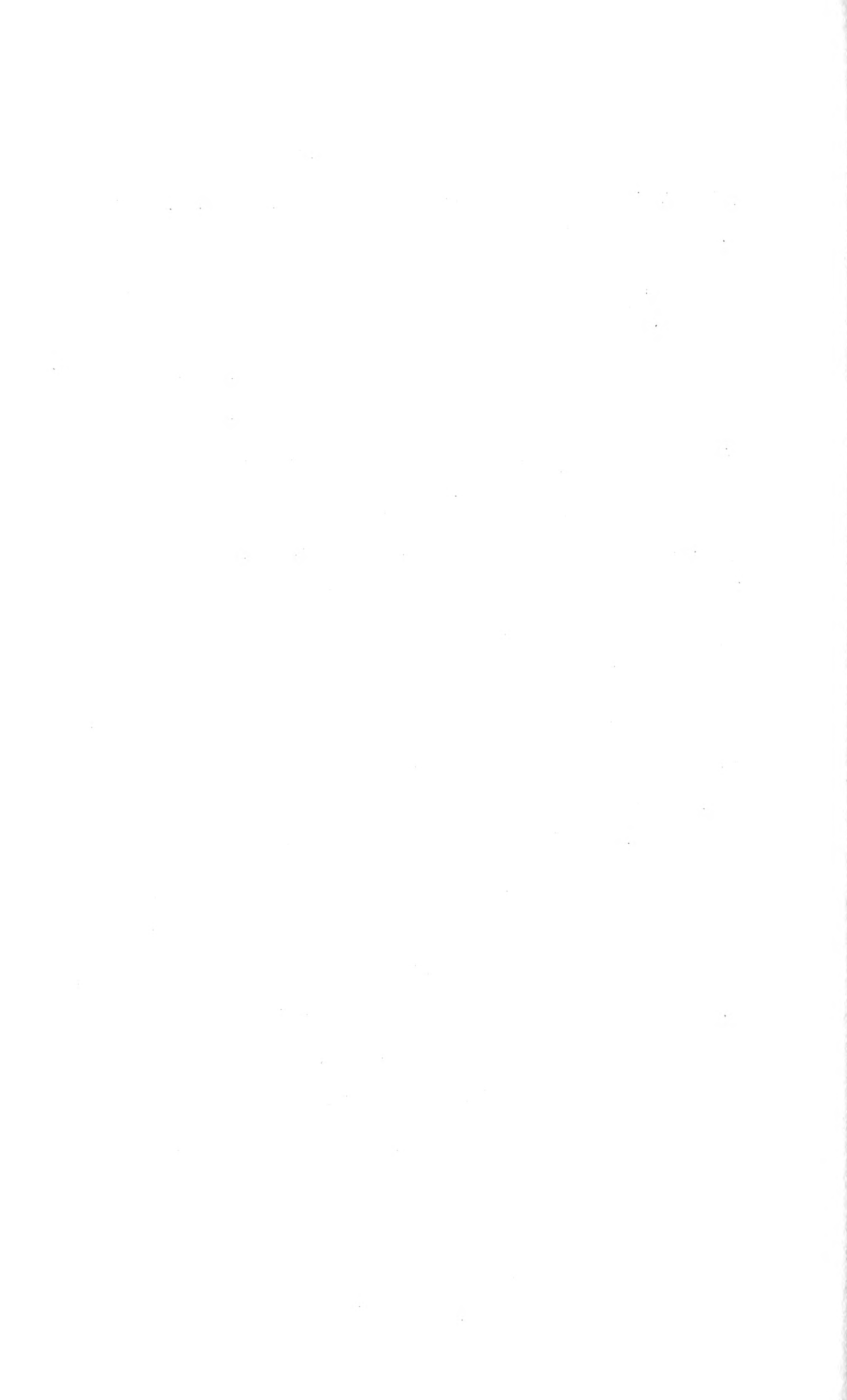

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 7772

GEORGE D. HUBBARD,

Appellant,

—vs.—

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

At the trial of the cause in question, two separate cases involving the appellant George D. Hubbard were, by consent of all parties, tried together. In the first, the appellant, George D. Hubbard, was charged with having entered into a criminal conspiracy with Samuel Lewis, Perry V. Wilcox, and Howard R. Crow, to em-

bezzle and wrongfully convert to their own use intoxicating liquors then in possession of George D. Hubbard by virtue of his office as Collector of Customs for the United States Customs Collection District No. 30, and in Count 2 of entering a conspiracy with Samuel Lewis, Perry V. Wilcox and Howard R. Crow, to defraud the United States by impairing, obstructing, or defeating the lawful function of the Treasury Department of the United States in its administration of the Tariff Act, first by converting to their own use, or to the use of some one or more of them, intoxicating liquors which were in the possession, or might thereafter come into the possession of the defendant, George D. Hubbard, by virtue of his office as Collector of Customs for the United States Customs Collection District No. 30; and second, by themselves executing and causing others to execute false certificates showing the destruction of the liquor converted to their own use; and third, by falsifying or causing the falsification of a record known as "Receipt and Delivery of Seized Goods".

To this charge, the jury returned a verdict of not guilty as to all defendants (except Lewis who had not been apprehended).

In the second case, the one now under consideration, the appellant George D. Hubbard was charged

specifically with having converted to his own use, and thereby embezzling, eighty-four (84) quarts of intoxicating liquors which had come into his possession and under his control as Collector of Customs for the United States Customs Collection District No. 30. In this cause, the Jury returned a verdict of guilty.

Counsel for appellant, as stated by him in his brief, has not brought before this Court all of the evidence in the case. The only evidence disclosed is the following:

> "Thereupon the plaintiff, to sustain the issue upon its part, called several witnesses whose testimony tended to show that the defendant had unlawfully converted intoxicating liquor and alcohol to his own use, and that he had delivered whiskey and alcohol to the United States Coast Guard Service and to the United States Coast Guard and Geodetic Survey without first obtaining authority so to do from the Commissioner of Customs as prescribed by the Regulations of the Secretary of the Treasury, promulgated under the Tariff Act of 1930, and that he authorized and certified to the destruction of intoxicating liquors and alcohol, which destructions had not been carried out in the manner prescribed by the Regulations of the Secretary of the Treasury, promulgated under the Tariff Act of 1930, (Tr. 14, 15).
>
> "Thereupon, at the close of plaintiff's case, the defendant introduced testimony in his own behalf tending to rebut the evidence presented by the plaintiff." (Tr. 15).

The certificate of the trial Judge reads as follows:

> "The foregoing 29 pages truthfully set forth

> proceedings had upon the trial of the defendant George D. Hubbard, *insofar* as they are stated. In addition to the testimony set out in said pages hereinabove, other testimony relative to and tending to prove the guilt of the defendant with respect to the material allegations contained in the indictment was introduced, received and considered." (Tr. 47).

It is the contention of appellee, (1) that the indictment was sufficient, and that the demurrer thereto was properly overruled; (2) that the instructions as given by the Court constituted a fair presentation of the law, and that no error is to be found therein; (3) it is the further contention of appellee that under the certificate above given, where all of the material testimony is not contained in the record, that appellant is confined in his appeal to errors in the indictment itself, and cannot complain of instructions given by the Court unless he can show that by the instructions a defendant's constitutional right has been invaded.

ARGUMENT

Assignment No. I.

Demurrer

The only question raised by appellant as to the demurrer is that the indictment did not negative owner-

ship of the intoxicating liquor in the defendant. The indictment in the present case is almost identical with the indictment in the case of *Ford v. United States*, 3 Fed. (2d) 104. In that case, the first count of the indictment, after describing the defendants as officers and employees in the internal revenue service of the United States, charged that the said defendants did

> "Unlawfully and feloniously convert to their own use and embezzle certain property which had come into their possession and under their control in the execution of their said offices aforesaid, and under color and claim of authority as such officers aforesaid, to-wit, a large quantity of intoxicating liquor, to-wit, one hundred fifty-three (153) quarts of whiskey."

The same question was raised by defendants in that case as is urged by the appellant in this case, namely, that the indictment did not allege that the intoxicating liquor did not belong to the defendant. In upholding the indictment, the Court said:

> "An allegation of ownership of property stolen or embezzled is usually required in indictments, not because ownership is material, but for the purpose of identification, so that a defendant may prepare his defense and protect himself against a subsequent prosecution for the same offense. An allegation that the owner was unknown would have been sufficient in this case, and, it may be conceded, would have made the indictment better . But we think the challenged counts are sufficient, as the defect is at most one of form only. The property could not have been that of the de-

fendants, or any of them, and whether it belonged to the United States, or some person other than the defendants, was immaterial. It came into the custody of the defendants under circumstances which made their taking of it an offense under the statute."

Likewise, *Hoback v. United States*, 284 Fed. 530, 532.

Counsel's Brief refers to 20 Corpus Juris 416 as authority for the doctrine that the government must negative ownership in the defendant. The authority for the doctrine therein stated is found in *State v. Ensley*, 97 Northeastern 113, 177 Indiana 483, referred to in the Notes to the section quoted. In that case, after stating the general rule, the Court upheld the indictment because it read:

> "That said sum of money had come into the hands of Oliver P. Ensley, as such treasurer, by virtue of his office as treasurer."

See also *United States v. Dimmick*, 112 Fed. 352. On page 353, the Court said:

> "If, however, it should be conceded that the indictment would have been better if it had expressly charged that the defendant did not, at the date he was required so to do, nor at any time prior thereto, make deposit of the money referred to, still it does not follow that judgment should be arrested because of the omission of this express charge, as there is an implied negative of the fact that the deposit was made before the date at or within which it was required to be made, in the allegation that defendant knowingly, wilfully, and

feloniously failed to make the deposit as required."

And further, in the same case, the Court said:

"The Statute reads—

'No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceedings thereon be affected by reason of any defect or imperfection in the matter of form only, which shall not tend to the prejudice of the defendant'."

In the case of *United States v. Greene*, 146 Fed. 779, the Court said:

"The obligation is on the government in every case to make out its charge against the accused beyond reasonable doubt. It is a presumption of law that the prisoner is innocent. When the *charge* is made, it is then the duty of the court, in obedience to this modern practice in criminal cases, to discourage technical objections to indictments unless they allege defects projudicial to the prisoner in his defense."

In the case of *Grandi v. United States*, 262 Fed. 123, the Court said:

"A motion to quash the third count, as not charging that the goods were in fact so stolen, was denied. There is an absence of such specific allegation. But while the count was thus technically subject to criticism, yet, in view of the frame of the indictment taken as a whole, plaintiff in error could not well have been misled to his prejudice. The count fairly informed the accused of the

charge against him and sufficiently so as to enable him to prepare his defense and to protect him against further prosecution therefor.

"The charge that defendant knew the goods to have been stolen naturally implies that the goods had been in fact stolen. The verdict should not be reversed on account of a defect so obviously technical and unsubstantial."

In the present case, the defendant having been clearly apprised of the nature of the charge, the demurrer to the indictment was properly overruled.

Assignments Nos. VIII and IX.

Counsel for appellant frankly admits that he made no requests for the instructions which he says should have been given. His contention is based upon the fact that said instructions are so material that the Court of his own volition should have given the same.

While it is true that the Court must of its own volition set forth sufficient in his chage to inform the Jury of the necessary facts to be proven, it is only in the rare and exceptional case that a verdict can be set aside on that ground.

The general rule is, of course, that a party cannot complain of instructions on failure to charge relative to the issue, instruction concerning which a request has not been made. *National Biscuit Co. v. Litzky*, 22 Fed. (2d) 939.

A careful reading of the instructions of the Court will demonstrate that the Court very clearly set forth the essential elements of the crime, not only of conspiracy, but also of embezzlement. In his instructions, and throughout the course of the trial, the Court was extremely careful to see that all of the rights of the defendant were protected. Completeness of the instructions, and the fairness of them, was such that counsel for both sides commended the Court at the conclusion of the trial for the instructions given to the jury, (Tr. 43, 44).

A paragraph from the case of *Wolf v. United States*, 283 Fed 885, on page 889, is especially pertinent to the present contention of counsel:

> "Mistakes of omission or incompleteness of a charge may be prejudicial, but whether section 269 of the Judicial Code, as amended, requires us to note unassigned error of this nature may be seriously questioned. The duty of counsel to point out the omissions, to object and to except, is certainly as great as the duty of the court to include all that might properly be inserted in the charge. Certain essential elements in the crime, in view of all the evidence in a given case, may become quite unimportant due to the undisputed character of the evidence or to the fact that such necessary facts are admitted during the trial. Naturally under such circumstances the court would not elaborate upon that phase of the case, the most successful charge brings sharply and prominently to the jury's at-

tention the disputed and crucial issues, and best serves its purpose when it makes intelligent determination by the jury of such issues unavoidable. Certainly this court is not justified in disturbing a judgment when the omission of the court to elaborate upon one phase of the case is in reference to a subject concerning which there is little or no dispute. Likewise the court's failure to dwell upon the phase of the case not in serious dispute is generally beneficial to the defendant, and counsel's failure to direct attention thereto may well have been due to a desire not to force an issue in support of which his position was untenable."

Assignment No. II.

"All United States Courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the Court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." 28 U. S. C. A. 391, 40 Stat. 1181.

The various Courts have construed this Statute to mean that the burden is now on the plaintiff in error to show not only that error has occurred but, in addition, that the error was prejudicial.

"We gather the Congressional intent to end the practice of holding that an error requires a reversal of the judgment, unless the opponent can affirmatively demonstrate from other parts of the record that the error was harmless, and now to

> demand that the complaining party show to the reviewing tribunal from the record as a whole that he has been denied some substantial right whereby he has been prevented from having a fair trial." *Simpson v. United States*, 289 Fed. 191.

See also *Shuman v. United States*, 16 Fed. (2d) 457; *Nolan v. United States*, 75 Fed. (2d) 65; *Horning v. District of Columbia*, 254 U. S. 136.

In the discussion of this appeal, we must always bear in mind that two cases were being tried together.

The instruction referred to on page 5 of appellant's brief was given by the Court with a special refererence to the conspiracy charge. In that case, the jury brought in a verdict of not guilty. As applied to the present case, however, the instruction as given by the Court was correct, and certainly was not prejudicial.

Counsel says, (Appellant's Brief, page 4):

> "Let us assume, for example, that the defendant had taken alcohol, etc., and had it poured into radiators of government cars to be used for anti-freeze, * * * or suppose he took the liquor which had been seized and *before* obtaining authority * * * he delivered that to the Coast Guard * * * to be used for governmental purposes."

The Court, (Tr. 36) eliminated any such possibility by the following instruction:

> "You are instructed that intent is an essential element of the crime charged, and it is the duty of the government to prove guilty knowledge on the part of each defendant, and before you can find any defendant guilty of such crime, you must find that each defendant had an intention to take part in the conspiracy and had an intent to defraud the United States, or to commit an offense against the United States, as charged in the indictment. And, if you believe from the evidence that one or more of the defendants did not have such intent, you must acquit such defendant or defendants."

Then again, (Tr. 34):

> "You are instructed that the law gives rise to the presumption that persons in the discharge of their duties are always prompted by honest motives. You will accord to the defendants herein, and each of them, the benefit of such presumption until it is overcome by evidence convincing you beyond reasonable doubt and to a moral certainty that a particular defendant or particular defendants are or were not prompted by such honest motives."

In the embezzlement case, appellant was convicted. The Court was very careful in his instructions to separate the two cases. His instruction in the present (the embezzlement case) reads as follows:

> "I have heretofore defined embezzlement. In the second case (the case here involved) the defendant, George D. Hubbard alone is charged with embezzling 84 quarts of intoxicating liquor which had been seized on board the motorship Heranger, and which came into his possession as Collector of Customs. If you find this liquor had been seized

under the customs laws, and did come into his possession as Collector of Customs, and he appropriated it, or any of it, to his own use, or permitted others to do so, with intent to deprive the true owner thereof, he would be guilty as charged."

That this instruction is correct is not disputed.

Assignments Nos. III and IV.

Counsel's third and fourth assignments of error are based upon the Court's instruction defining criminal intent. The Court's instructions on the question of intent are as follows.

> "You are instructed that intent is an essential element of the crime charged, and it is the duty of the government to prove guilty knowledge on the part of each defendant, and before you can find any defendant guilty of such crime you must find that such defendant had an intention to take part in the conspiracy and had an intent to defraud the United States, or to commit an offense against the United States, as charged in the indictment. And, if you find from the evidence that one or more of the defendants did not have such intent, you must acquit such defendant or defendants. Intent is an ingredient of crime. It is psychologically impossible for you to enter into the minds of the defendants and determine the intent with which they operated. You must, therefore, determine the motive, purpose, and intent from the testimony which has been presented and you will consider all the circumstances disclosed by the witnesses as testified to, bearing in mind that the law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts, knowingly or intentionally committed, cannot be justified on the

ground of innocent intent. The color of the act determines the complexion of the intent. Intent to defraud is presumed when an unlawful act is proved to be knowingly committed."

This instruction is almost identical with the instruction given in *Agnew v. United States*, 165 U. S. 36, 41 L. Ed. 625.

> "The law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent. The color of the act determines the complexion of the intent. The intent to injure or defraud is presumed when the unlawful act, which results in loss or injury, is proved to have been knowingly committed. It is well settled, to which the law applies in both civil and criminal cases, that the intent is presumed and inferred from the result of the action."
>
> "In our opinion there is evidence tending to establish a state of case justifying the giving of the instruction which was unexceptional as a matter of law."

See also *McKnight v. United States*, 111 Fed. 736; *Savitt v. United States*, 59 Fed. (2d) 543.

In the case of *McGregor v. United States*, 134 Fed. 187, on page 197, the Court said:

> "The record thus discloses that the jury were, we may say, repeatedly charged by the court that the actual intention to defraud was an essential element of the crime, without which no offense

> could have been committed, and that, unless such intention was found by the jury from the evidence, the defendants should be found not guilty. As the record makes the case, this additional instruction of the court was not intended to modify or set aside any of the instructions theretofore given, but was intended to explain to the jury a method provided by law by which the jury might, from the evidence, find whether or not such intention existed. It is well settled that the law presumes that every man intends the legitimate consequence of his own acts, and that such acts, when knowingly done, cannot be excused on the ground of innocent intent. In both civil and criminal cases the intent with which an act is done is inferred from the result of the act itself, and the law presumes that every man intends the legitimate consequence of his own acts."

And the Supreme Court of the United States, in the case of *United States v. James A. Patten,* 226 U. S. 525, 57 L. Ed. 333, an action by the United States against the defendant for restraint of trade:

> "And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts, and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produced the result which the statute is designed to prevent, they are in legal contemplation, chargeable with intending that result. *Addyston Pipe & Steel Co. v. United States,* 175 U. S. 211, 243, 44 L. Ed. 136; 148 Sup. Ct. Rep. 96;

United States v. Reading Co. 226 U. S. 324, 370, ante, 243, 33 Sup. Ct. Rep. 90."

CONCLUSION

In this case, the defendant was honestly apprised of the issues confronting him, was given a fair and impartial trial by the Court and the jury. No error having occurred prejudicing his rights, and from the evidence brought before this Court no valid grounds being shown how the jury in a second trial would have reached any different verdict than in the present trial, counsel for the government respectfully submits that the judgment of the Court should be affirmed.

Respectfully submitted,

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